TECHNICAL NOTE

5

RECREATION NO. 2

INCOME OPPORTUNITIES THRU GOOSE HUNTING LEASE SALES ON THE MIDDLE ATLANTIC COASTAL PLAIN

This technical note and related technical articles provide useful information when discussing or planning goose hunting leases and other hunting leases with persons, cooperators or groups.

Several papers published in a conference proceedings entitled, Income Opportunities for the Private Landowner Through Management of Natural Resources and Recreation Access (West Virginia University Extension Service, 1990) that present additional pertinent information are also provided. These technical papers are:

1. Insurance: Questions and Answers Related to Fee Access by Earle Dillard.

2. Legal Liability Associated with Profitable Resource-Based Recreation on Private Land by John C. Becker.

3. Waterfowl: An Alternative Income Producing Option for Recreational Access by Isadore Matarese and Linda Matarese Graham.

4. Waterfowl: Income Potential and Problems by Edward C. Soutiere.

Other information enclosed:

1. Goose Pit is Handicapped Accessible by Ben Hall, published in Happy Hunting Grounds, Kentucky Fish and Wildlife, November - December, 1990.

2. Construction Specifications for a Pit Blind by Pennsylvania Game Commission, Bureau of Land Management, July, 1989.

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Income Opportunities Thru Goose Hunting Lease Sales on the Middle Atlantic Coastal Plain

The following income figures are based on 1989 typical prices in Maryland and Delaware (Delmarva Peninsula). Ralph Timmons, SCS District Conservationist in Dover, Delaware, provided much of this information based on working in both Maryland and Delaware Counties of the Delmarva Peninsula.

I. Successful Operations

The most successful of the large commercial goose hunting operations have the following:

A. Ideal Conditions

1. Ownership or controlled area is 100 acres of cropland or more in size.

2. There is a sanctuary or refuge pond of 0.5 acres to 10 acres on the property and no hunting is permitted within 1000 feet in any direction.

3. Hunting allowed no more than four days per week. Other days are rest period.

4. Primary crops raised are grain corn (harvested condition), cereal rye winter cover crop and winter wheat.

5. Ownership or controlled area has large fields of at least 40 acres each in size.

6. Permanent blinds are 1,000 feet or further apart.

7. Five or six blinds available.

B. Minimum Conditions

1. Ownership consists of one field of 25 or more acres.

2. Area (fields) not hunted on weekends.

3. No sanctuary pond present.

4. Crop(s) include harvested grain corn, winter rye cover, winter wheat, alfalfa, some pasture and hayland of lush high quality growth.

5. Permanent blinds are at least 750 feet apart (40 acres).

6. One blind available or potential.

II. Access Rates and Blind Rental Rates

A. Rental rates for permanent blinds provided by landowner

1. Per Day Rate - $150.00 to $400.00 per person for a two man blind. $100.00 to $300.00 per person for a four man blind.

2. Full Season Blind Lease - $1,500.00 to $8,000.00 per person for a four man blind. Likely to limit hunting to four days per week.

B. Access only - hunter builds own blind

1. Per Day Access Rate - $100.00 to $150.00 per person with up to four persons in a blind. Likely to limit hunting to four days per week.

2. Full Season Access Rate - $1,500.00 to $5,000.00 per person with up to four persons in a blind. Likely to limit hunting to four days per week.

III. Liability Insurance

- Most operators have $200,000.00 plus liability insurance protection.

- Considerations -

(a) Many sportsmans clubs have property damage liability insurance as a membership benefit. This insurance provides protection to property owners for certain types of damage caused by club members.

(b) Do not rent out guns. Hunter must bring own gun. If hunter has or gets barrel obstruction (e.g., mud, snow, 20 ga. shell) and injures himself your liability is minimized.

(c) Do not sell or provide reloaded ammunition as such could put you in jeopardy of liability suit.

(d) Maintain minimum of 750 feet between blinds. Discourage unsafe shooting of cripples. Encourage use of retrievers.

(e) Maintain minimum of 750 feet between blind and public roads and occupied buildings even though state minimum may be less.

(f) Correct any potential hazards occurring on the entire farm (e.g., fill pits, holes, woodchuck burrows, bring livestock in to exercise lot, confine aggressive dogs, remove waste barbed wire).

(g) Do not allow upland game hunting on farm during goose season.

IV. Other Services

(a) Suitable vehicle parking.

(b) Cleaning and plucking of geese is not typically provided. Other businesses (sporting good stores, entrepreneurs, etc.) provide this service.

(c) Dogs are not typically provided. Hunters are welcome to bring their own.

(d) Stools (land decoy) are not typically provided by operator.

V. Permanent Blind Construction

(a) Blind costs average $500 for materials and require four person days to construct one blind. About one day per year is required for maintenance of a blind.

(b) Blinds are typically an earthen pit 4'8" to 5' in depth, a width of 4' minimum and 5' ideally, and a length of 10' minimum for three people and optimally 16' long for four persons.

(c) Walls and floor of the blind should be surfaced with pressure treated wood.

(d) Ideally, blind roof is sloped rearward and is on a roller and track assembly. An 8"-10" front opening the length of the blind is for observation.

(e) A bench seat is installed in each blind.

(f) A wooden ladder is constructed at one end of the blind.

VI. Stools

(a) Stuffed bird is best type. Styrofoam three dimensional type is second best, silhouette is

adequate but must be positioned 90 degrees to expected goose flight path to be visible.

(b) Recommend either stool groups of 8 to 12 or 24 to 30 as these size groups correspond to common feeding flock size.

VII. Crops to Consider

(a) The larger the grain corn field (must have been harvested) the better. Stripcropping which includes grain corn or cereal rye or winter wheat is very good. Strips of alfalfa or other hayland seedings are fair for attracting geese.

(b) Avoid crops which have little waste grain such as silage corn. Avoid low palatability plants like hairy vetch, a plant often used as a winter cover crop. Conversely, to keep geese off an area not huntable, plant low palatability plants, such as timothy, hairy vetch, soybeans, oats and vegetable crops.

VIII. Pond or Marsh Development - Sanctuary

(a) 0.5 to 10 acres in size.

(b) Should have flashboard weir or other adjustable principal spillway to allow for water level control for planting of shallow zones.

(c) Varied shoreline (irregular).

(d) No trees within 100 yards is ideal.

(e) Islands are not necessary for sanctuary ponds - if spring nesting is desirable include islands.

(f) Depth of two-thirds of the pond area should be less than four feet deep.

Insurance: Questions and Answers Related to Fee Access

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Abstract

Historically, insurance for businesses has usually been easy to obtain at a reasonable price to protect against loss of assets and liability claims. However, in the case of newer types of businesses based on fee access to one's property, insurance underwriting and rating rules are still being developed. The result is that insurance coverage for certain types of fee access activities may be difficult or impossible to obtain, or if available, may be rather expensive. On the other hand, many fee access businesses can get insurance at reasonable rates with little or no difficulty. In this paper, the availability and general premium costs of liability insurance for several fee access business operations are briefly discussed.

Introduction

In the past, protecting a company or an individual's assets against the adverse financial effect of loss played a minor role in overall business strategy. Insurance–the traditional form of protection–was relatively easy to obtain. But changing economic conditions, new technologies, larger risks generally and an evolving legal climate have made specialty insurance harder to obtain and more expensive when it can be found.

Practically all, or at least most, of the income producing businesses discussed during this conference are of a specialty nature and thus will require special handling by a local insurance agent. A local insurance professional will contact firms such as my own which specializes in "hard to place" and unusual insurance coverages. Our firms are usually representatives of Lloyds of London as well as numerous domestic (U.S.) companies specializing in various classes and types of hard to place business. A quotation of premium charges (your cost) will be given to the local agent and he will then advise you so that you can determine the limits of liability you need and can afford.

The various types of fee access and/or utilization of land for income producing opportunities fall into really just two categories–a product or service. Of the two, it is more difficult (and much more expensive) to obtain product liability due to the extremely high judgments and awards in the courts for these type of claims. A product is just what the name implies. You would be furnishing something of value to your customer. Service is certainly self-explanatory; you would be performing or rendering a service by permitting your customer or an individual to utilize your property in some manner.

Other speakers have already discussed the legal liabilities associated with developing profit-based recreation on private land. My purpose, is to speak on the matter of insurance and perhaps give some examples of the type of claims with which you might be faced; to comment on a few of the activities that are available for profit on private lands and whether or not insurance coverage is available. Due to the complexity of rating procedures and the many types of activities that are available for fee access, it will be impossible to give dollar figures for the various costs for liability insurance. I will, however, comment on whether or not the premium will be fairly high, moderate or low.

Insurance for Various Businesses

Fee Hunting

First let me talk about fee hunting or leasing land to individuals or groups on a daily, weekly or seasonal basis for the purpose of hunting game. Liability insurance coverage for this activity is available. The rating is based on the amount of acreage leased and whether or not it is leased to groups on a daily, weekly or seasonal basis. The cost is fairly moderate, but can be obtained only through specialty insurance carriers.

Hunting Preserves

From an insurance standpoint, this is similar to fee hunting except it is a reserved area used by members only and is not leased to individuals or certain groups. This coverage is available and the rating is based on the number of members who use the preserve. The cost is fairly moderate.

Rod and Gun Clubs (Owning or Leasing)

This coverage is also available with the rating again based on the number of members; the cost is fairly moderate.

Hunting, Fishing and Recreation Lodge

Obviously there would be a building involved and you would have to have property insurance covering the building and contents. Referring strictly to the liability aspect, the coverage is available and, in this particular case, would be based on both acreage and number of members. And again the premium is fairly moderate.

Fishing From Stocked Streams and/or Ponds on Private Property

This coverage is available and the rating is based on the amount of receipts (fees paid in cash). The premium for this coverage is fairly low and is not at all difficult to obtain.

Guide Service to Scenic, Nature, Cultural and Historical Attractions

This coverage is available. The rating is based on the amount of receipts. The premiums are fairly moderate.

Bed and Breakfast

Here again, property and contents coverage would be needed. Insofar as liability coverage is concerned, it is available and is based on receipts with a fairly low premium.

Whitewater Rafting

This coverage is available from specialty carriers. As a matter of interest, our firm writes a number of these risks, not only in West Virginia but also in surrounding states. The premium is based on the number of rafting days that the particular rafting company operates with the cost being fairly moderate.

Rock Climbing

We do not have nor do we know of a company that will write liability insurance for rock climbing.

Cave Exploring

This coverage is available. Rating is based on the receipts and has a moderate cost.

Skiing (Downhill and Cross Country)

This is a very difficult coverage to obtain, and at the present, even our firm which represents some 40 specialty companies does not have a market to cover this type of operation. I am not saying that it cannot be obtained, but if so, it would be very difficult and extremely expensive.

Campgrounds

This coverage is readily available. Rating is based on receipts and is of moderate cost.

Hiking

Liability coverage is readily available. is based on receipts, and has a moderate cost.

Nature Craft Workshops

This too is readily available, rating is based on receipts and has a fairly low cost.

Cut Your Own Firewood, Christmas Trees, Etc.

This coverage is readily available, is based on a flat rate and is of very low cost.

Pick Your Own Fruit and Vegetables

This too is readily available, is based on receipts and is of moderate cost.

Swimming

This coverage would be a little more difficult to obtain depending upon the type of operation whether it be a private swimming club or a public swimming pool. The rating would be based on the number of members in a private club or the amount of receipts in a public pool. The cost is from somewhat moderate to high but can be obtained without too much difficulty.

Boating

This is available and the rating is based on the number of boats and receipts. The cost is fairly low.

Need for Liability Insurance

The intricacies of insurance are not a particularly interesting subject, but I do feel that we need to review the various activities of the more logical prospects for those of you who are interested in pursuing income opportunities as a private landowner. It would be virtually impossible to list the many and varied claims that could result from the various operations I have described today, but a few examples would be a gunshot wound or death resulting from someone else hunting on the same land and if such a situation should occur, not only the person who fired the gun, but also the owner of the land would be named in a lawsuit. Thus, liability exists and would have to be defended in court. While on the land a person could step into a hole, fall from a cliff, trip over a tree or rock, or many other types of accidents. I assure you that should any of these things occur a claim would be presented and would have to be defended. Drowning in a pond or lake, being burned by ashes or coals, injury during athletic activity, hurt by a barbed wire fence, collapse of bleachers, dragging by a horse or animal, being struck by a flying object of some sort, a sledding or snowmobile accident, and an injury from a rusty fence are other examples. Again, should any of these, and many other things occur, the landowner is going to be accused of negligence, having an attractive nuisance on the property, failure to have adequate warning signs and perhaps even willful misconduct. Some of these potential liability claims might seem to be "way out" but I assure you that they do happen and there are many others to which I have not made reference. While it is true that some claims will not be paid there is still the cost of defending them in court which, in many cases, can be extremely expensive.

Insurance is a very complex subject, and in talking about the many varied classes of business discussed in this conference it is impossible to adequately cover each of them in the time available.

Legal Liability Associated with Profitable Resource-Based Recreation on Private Land

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Abstract

Lawful possession of land through ownership or lease grants the possessor power and authority to decide what activities are conducted on the land. In contrast to this authority, a possessor is exposed to liability for injuries and damage caused by the activities.

In exercising the right to use property for his or her own purposes, the possessor has the duty to protect the physical well being and property of others who may be affected by their use. If individuals other than the possessor use the property, the possessor may have a special duty to protect the interests of such users while they are on the premises. In some jurisdictions the nature of such duties depends on the relationship between the possessor and the user or the age of general obligation on the user. The resulting duty imposed on the possessor may be very broad or very narrow. Other jurisdictions discount the relationship between the possessor and user and impose a general obligation on the possessor to use reasonable care under the circumstances to protect the interests of those who use his or her property.

Recognizing the concern for expansion of doctrines that impose liability on possessors of land, legislative action has been taken to encourage possessors to make land available for recreational or open space uses in exchange for limits on the duty owed by the possessor to the user. As legislatively crafted, exceptions to these general duties, specific conditions or requirements may exist before the limitations are effective.

Introduction

This paper reviews a series of issues involving statutory and decisional law relating to landowners, lessees or occupiers of property and is based on the most current resources available to the author. While the discussion contained herein is intended to be informative of these issues, the author does not intend the discussion to be legal advice to the reader or to replace the need for such advice in applying any of these principles to specific fact situations. If a person reading this paper desires legal advice on the application of these rules to a particular situation, the services of a competent professional should be obtained to provide such advice.

Having achieved ownership of real or personal property, an owner ascends to a position of power and authority regarding uses and activities that take place on it. Likewise, a person who claims the right to possess another's property under a grant of permission from the owner may also ascend to this position. Each of these concepts recognizes that this authority springs from the status of possession, either through ownership or consent from one who qualifies as an owner.

Although possession grants such rights, exercise of the right is not without its limits. For example, members of a community, acting through its representatives, may impose restrictions on specific activities in specific locations, such as those found in zoning regulations or subdivision ordinances. Criminal statutes may invoke the weight of criminal sanction to prohibit people in possession of property from engaging in activities that society views as contrary to what is good and wholesome. For example, laws regulating the sale and offering for sale of material considered to be pornographic are a statement of a community's view of what is

objectionable conduct.

Further, a person must be aware of the effect which any of its chosen activities have on individuals who are on or off the property where the activity is being conducted. To the extent that a person in possession faces responsibility for personal injury or property damage suffered by other individuals, this responsibility becomes a self-executing mechanism to enforce restrictions on what the possessor can do or accomplish on the property. The owner is free to choose what to do, but the resulting responsibility imposes a price on this freedom. Once the price becomes too high, for even a few people, decisions will be made to switch to other activities that do not carry this price tag with them. For example, if conducting a particular activity makes a person absolutely liable for property damage or personal injury it creates, that person is faced with either covering the risk of loss or selecting some other activity that doesn't generate the same risk or degree of risk.

This paper addresses several aspects of a possessor's liability for injury or damage caused by activities or property under his or her control. Specifically, the paper addresses rules that define a possessor's liability under theories of nuisance liability and liability for injury to those who come on to a person's property and suffer injury or damage as a result. Within this latter concept, sometimes referred to as "premises liability" [1] the paper will point out traditional common-law rules for developing an owner's duty, a modern approach to developing this duty and legislative attempts to encourage opening of private land for public recreational purposes by changing the duty. Each of these concepts will be discussed in sequence.

Nuisance Theory

The general premise of the law of nuisance regulation is that no person is absolutely free to choose to perform acts that others find offensive or that interfere with others' right to be safe and secure in their own person and property. Each person must consider the rights of others who may be affected by their activities. If an individual chooses to use property in an unreasonable, unwarranted, or unlawful manner and such use produces annoyance, inconvenience, discomfort or other harm, the law of nuisance may afford an injured or offended person a right to recover their losses or to stop the offensive conduct.[2] In contrast to a nuisance, the civil law of the United States recognizes a similar concept called trespass. The essential difference between the two centers on the way the damage or loss is suffered by a complaining party.

Under nuisance situations, loss or damage results from an activity that takes place some distance away. For example, use of equipment may create noise and dust that interfere with residential and commercial activities that occupy the area. Trespass, however, deals with more direct infringements with another's right of property, such as actual damage to property or invading the property of another.[3] If performing an activity does not physically invade another's property, the general remedy is nuisance rather than trespass.

As an activity that creates legal consequence to the person performing it, nuisance remedies are applicable to intentional acts as well as those that are negligent or reckless. In addition, nuisance theory can be triggered by activity that is neither negligent nor willful such as ultra-hazardous acts that give rise to liability even if the utmost degree of care is used to avoid injury or damage to others.[4]

Nuisance Activity Classification

Nuisance activities can be classified in one of three ways: those which are considered nuisances in themselves or nuisances per se; those which are not nuisances per se, but which become nuisances because of the place where the activity is conducted; and those activities which in their nature may be nuisances, but as to which there may be honest differences of opinion.[5] To be

considered a nuisance per se, the activity must of itself and its inherent capabilities cause injury or threaten the life or property of others.[6] An activity that is classified as a nuisance because of its location is an activity that is lawful in its own right, but which becomes objectionable because of the location, circumstances or surroundings where it is conducted. For example, some might consider early morning use of a propane gas exploder cannon to scare black birds away from a cornfield located next to a camping resort to be a nuisance because of the discomfort and annoyance it causes to the campers using the resort.[7] The cannon itself is a useful and proper piece of equipment, but its use in close proximity to others that causes annoyance and discomfort may be an objectionable use.

Another description of nuisance activity distinguishes between public, private and mixed types of nuisance activities. In this context the difference lies in the scope of those affected by the acts. If the public at large is affected, the activity is classed as a public nuisance. For example, acts that damage public order, decency, or morals; or that obstruct rights enjoyed by all are considered public nuisances.[8] If only a limited number of people are affected, such as only one person or a few people, the activity is considered a private nuisance.[9] In this context, the activities differ only in the extent or scope of the detrimental effect.[10] Another difference between public and private nuisances involves the remedy available to deal with the objectionable conduct. In the case of a public nuisance, the general public may seek to redress the wrong it has suffered by imposing criminal sanctions on the offender. Private nuisances, however, are remedied by injunction to stop the offending activity or damages that compensate for injury or loss suffered.[11]

In some contexts a nuisance may be both a public and a private nuisance. Such an activity may injure many people as a public nuisance, but also create special injury to select individuals beyond those injuries suffered by the general public.[12] To those suffering special injury, the activity becomes a private nuisance, while those who suffer the general injury consider it to be a public nuisance. Those activities which are both public and private nuisances are generally referred to as mixed nuisances.[13]

Nuisance Situations and Analysis

Individuals who control decisions about the activities that take place on property are generally bound to follow the rule that they must not use their property in such a way that it injures another person.[14] A person has a right to use his own property for a lawful purpose, provided the person does not thereby deprive others of any right or enjoyment of their property that is recognized and protected by law, or unreasonably interfere with or disturb a neighbor's comfortable and reasonable use and enjoyment of property. Each person, therefore, must consider the corresponding rights of other owners when selecting activities to conduct on property he or she controls. Although this consideration can be viewed as a restriction, the precise limits of confinement are difficult to determine,[15] but they must generally be viewed as both reasonable and lawful.[16]

Reasonable Acts. In regard to the reasonableness inquiry, each case will be decided on its own facts and circumstances. Among those facts considered are the locality and surroundings where the activity is conducted, the nature utility, and social value of the use, and the extent and nature of the harm involved.[17] In this analysis, the harm done to the complaining party is weighed against the utility of the actor's use of property and the location where it is conducted.[18] The question of reasonableness should be determined objectively. The question is not whether a reasonable person would regard the invasion as unreasonable, but rather whether reasonable persons looking at the situation impartially and objectively would consider it to be unreasonable.[19] In some jurisdictions this determination is made by the court, and in others by the jury.

Lawful Acts. In regard to the lawful inquiry, it has been held generally that a nuisance cannot rise from the doing of a

lawful act in a proper place, but legality itself is not a conclusive determinant of what is or is not a nuisance.[20] For example, if a person performs a lawful act on his or her own property with an intention to annoy a neighbor such an act may be considered a nuisance.[21] Likewise, conducting a lawful business in an inappropriate place or an improper manner that interferes with a neighbor's comfort and enjoyment, may give rise to a finding of nuisance.[22]

It should be noted that by considering the surroundings where activities are conducted, recognition is made of the fact that what is a nuisance in one location need not necessarily be considered a nuisance in other locations.[23] Location and surroundings when measured by the mind and taste of the average citizen will determine whether specific activity is viewed as nuisance activity.[24] In the case of activity viewed as nuisance in its own right, it may be argued that such acts are nuisance irrespective of where they are conducted.[25]

A characteristic of nuisance activity is that it injures the public that comes in contact with it. If neither injury nor threat of injury result from the performance of the act, there is no nuisance.[26] While acts resulting in identifiable injury or damage are clear examples of sufficient injury, not every inconvenience, discomfort or annoyance will be sufficient to constitute a nuisance. The injury must be something more than what can be described as a slight inconvenience or petty annoyance when measured by the effect that the described conduct has upon a normal healthy person of ordinary habits and sensibilities.[27] Those with super sensitivities or super insensitivities are excluded from the pool of those who can measure the effect that such conduct has on the public.[28]

General Remedies for Nuisances

The person who creates a nuisance is generally liable for the resulting damage that it creates to individuals as well as the public.[29] While public policy may require that someone be held responsible for private nuisances that emanate from real property, an owner of such property does not face liability simply on grounds of owning the property from which the nuisance springs.[30] When liability determinations are made, the person who creates or controls the offending activity generally absorbs responsibility for the injury caused the activity.[31] If, however, an owner is aware that offensive activities are being conducted on property that he or she owns, allowing it to continue can create responsibility for the owner.[32] If an owner has no knowledge of offensive conduct being carried out and has been careful to proscribe the possessor's authority in the area of offensive conduct, an owner will generally not be viewed as responsible for nuisance activity conducted by the person in possession.

All persons who join or participate in the creation or maintenance of a nuisance are liable jointly and severally for the wrong and the injury done thereby.[33] In the typical context joint and several liability means that responsibility can be assessed against any one of several responsible persons or all responsible persons. For joint liability to exist, there must be some concert of action between the contributors to the nuisance.[34] If two or more persons who create or maintain a private nuisance act entirely independent of one another, without any community of interest, concert of action, or common design, each person is liable only so far as his or her acts contribute to the injury.[35]

Once having identified that a nuisance exists, a number of legal remedies are available to deal with the situation. These include an action for damages, and a suit to enjoin or abate the activity which may or may not be coupled with a claim for damages sustained in the past. In limited situations a criminal action to punish the offending party may exist.[36] In some jurisdictions, statutory remedies, such as special procedures for the summary abatement of nuisance activity, are also available.[37]

Action for Damages

In most jurisdictions an action for damages is a remedy that is distinct from an action to abate the nuisance

Generally, an injured party has the right to elect which remedy to pursue. These remedies are considered concurrent and an injured party may pursue either or both.[38]

Parties who may seek these remedies depend on the nature of the activity. As public nuisances damage a large number of people, the state may take action on behalf of its citizens to redress the grievance. Private nuisances, however, affect limited numbers of people, each of whom have the right to pursue redress of their grievances in their own name. A person in lawful possession of property, whether through ownership or other arrangement that authorizes possession, may maintain an action to enjoin nuisance activity.[39] In an action for damages, an owner or possessor would pursue the claim for damage to property.[40]

In an action to recover for damages, the injured party seeks compensation for all damages arising from the offending activity, whether temporary or permanent, or whether affecting real or personal property or personal injury.[41] Where injury to property is permanent, the loss of value attributable to the activity becomes a measure of damages. This loss is measured against any other activity to which the premises could be put, not necessarily the activity conducted by the possessor in question.[42] Cost of repairs that do not exceed the former worth of the property may also be considered as a measure of the loss of value.[43] If the nuisance activity causes temporary damage to property, the measure of damage is the difference in the rental or usable value of the premises before and after the injury, during the continuance of the nuisance, and within the period of any applicable statute of limitation.[44] If property is occupied by an owner, the measure of damages is the reduction in value of the use of property during the nuisance.[45] If property is occupied by someone other than the owner, the measure of damages is the reduction in rental value during the continuance of the nuisance.[46] In some jurisdictions, in addition to reduction in market, rental or usable value of land, an injured party may also recover damages for loss of the comfortable enjoyment of the property and the inconvenience and discomfort suffered by himself and his family.[47]

Action to Enjoin or Abate Nuisance Activity

A suit to abate a nuisance by means of an injunction generally requires that without the intervention of the injunction irreparable harm without a legal remedy will occur.[48] Injunctions to abate such activity are granted only where necessary and where caution and judgment indicate to the trial judge that the exercise of the judge's discretion to grant the injunction is warranted on clear and convincing grounds.[49] Although it has been stated earlier that an injured party has the choice of selecting a remedy in damages rather than an injunction, many courts have clearly and consistently held that an injunction will be issued only where there is no adequate remedy at law, such as an action for damages where the prospect of actual recovery is unlikely.[50]

Another aspect of nuisance activities that merit treatment by injunction is the continuing or recurrent nature of the offending conduct. Where such activity exists or is threatened to exist, an injunction may be the most effective way to resolve disputes between the party performing the activity and those who complain of its being conducted. Individual suits in such cases will be both time-consuming and expensive for all parties involved. An additional factor that enters into the decision to grant or deny an injunction is comparison of the loss to one party and advantage to the other resulting from a decision to grant or deny an injunction.[51] In this analysis, the court in deciding whether to exercise its discretion weighs the benefits and losses of each party from action it chooses to take.

In seeking an injunction all persons materially interested or possessing a community of interest should be joined as defendants in the suit.[52] Persons contributing to the offending conduct through separate and independent acts should be joined as defendants.[53] The owner of property on which the activity is being conducted can be joined with the party conducting the activity.[54]

If a person can abate a private nuisance which is causing damage or injury to the person's interests, such person may abate the activity without resort to legal proceedings if the person can do so without a breach of the peace.[55] In the case of public nuisances, an individual citizen may abate a public nuisance when and only when he or she has suffered some special injury by reason of it or when it interferes with, or obstructs, or injures his individual rights.[56]

Defenses to Nuisance Claims

In defending an action, any of the elements needed to prove of actionable nuisance activity are available to a defendant. Likewise, a defense centered around the requisites of the remedy being sought is viable for a defendant. Among other defenses that have been successful are those that argue a neighbor's claim of private nuisance must yield to activities the conduct of which are in the public's interest and a matter of public necessity[57] and that the complaining party consented to or permitted the construction and installation of the alleged offending facility being fully aware of the activity and its consequences.[58]

Among those arguments that have not been successful as a defense are the claim that the offending activity contributes to the welfare and prosperity of the community, that the offending activity predates the presence of the complainant and the complainant chose to come to the area anyway.[59] In some situations, courts consider these arguments not as complete defenses to a claim of nuisance, but rather as circumstances of considerable weight to be evaluated with all other evidence in deciding whether an actionable nuisance exists.[60]

As some nuisance actions involve negligence as the basis for the nuisance, traditional defenses such as contributory negligence and assumption of risk have been raised as defenses to actions for property damage and personal injury. Of these two concepts, contributory negligence has generally been held not to play a part in a nuisance action.[61] Assumption of risk, if available in the jurisdiction for general civil matters, has been cited as an available defense in nuisance cases.[62] In some jurisdictions this defense is only available where the complainant and defendant are in some contractual or consensual relationship to each other.[63]

A final argument raised in a challenge to continuing activity is that conducting an activity over a period of time creates the right to continue it, even if it is later held to be nuisance activity. This argument is a philosophical parallel to prescriptive rights granted under concept of adverse possession. Although neatly presented, few courts have been swayed to recognize this concept in support of a defendant's right to continue public nuisance activity. In the case of private nuisance activity, however, the argument has met with some measure of acceptance and recognition[64] if all of the required elements of adverse possession can be met.

Premises Liability

Other factors that influence decisions by people in possession of property are the rules that define the possessor's liability for personal injury or property damage suffered by those who entered the property and were caused by defects or dangerous conditions on the property. As this liability involves injuries occurring on the possessor's premises, this area of the law has been described as "premises liability."

Except where conduct of the possessor falls under principles of absolute liability for performing an ultra-hazardous activity, the liability of a possessor for injuries suffered while on the premises is generally predicated on the principles of negligence.[65] As a part of the general body of negligence law the first step is to establish a duty that the possessor of the land owes to the injured party who came on to it. Having identified the duty, consideration then turns to how the defendant's conduct

compared to the duty. If the defendant failed to meet the duty, the inquiry turns to the relationship between the failure to meet the duty and the personal injury or property damage of the injured party. This element in the inquiry is known as the concept of causation. This concept looks to establish a causal relationship between the failure to fulfill the duty and the personal injury or property damage suffered. If this causal relationship is met, the final step focuses on the question of damages directly caused by the defendant's failure to meet the duty owed to the injured party. If each of these elements is met, the defendant may find himself or herself in a position of being liable for the injuries or damages suffered by the defendant. Defenses to claims of liability are available to the defendant to defeat or blunt the claim of liability. These defenses take the defendant's own conduct into consideration and evaluate the relationship between this conduct and the occurrence of injury or damage to the injured party. If the injured party played a substantial role in the occurrence of the injury, the injured party may find himself or herself in the situation where recovery for damage or injury is substantially reduced or even eliminated.

In addition to the concept of negligence, the law of torts recognizes the concept of absolute liability for injuries flowing from performance of activities that are described as "ultra-hazardous."[66] Under this concept, those who perform these activities face liability for damage or loss causally related to it. This liability applies notwithstanding the efforts of the actor to prevent injury through the exercise of care, even the utmost degree of due care. In these cases, risk of liability becomes a cost of doing business.

Much like nuisance theory, principles of premises liability focus on the fact that possession of land does not give the right to use the land in a way that injures others. In describing the duty owed by a possessor to someone who comes onto the possessor's land, two general approaches have been taken. One view is the traditional common law view and the other is the modern view.

Liability for injury caused by defects or conditions on property is applied to those who occupy or possess and control the property in question.[67] In this context, "control" means substantial physical or genuine control of the premises and those things that are located on it.[68] In this discussion, a person who occupies or possesses and controls property will be referred to as a "possessor of property."

Under the traditional common law view, a possessor's duty to people who entered his or her land varies according to the status that such person has in relationship to the possessor. A person who comes onto land can be classified either as a trespasser, a licensee, or an invitee. The injured person's status at the time of injury controls the duty owed by the possessor of the property to the injured person.

A trespasser is a person who is on the property of another without permission or authority of any kind. A licensee, however, is someone who has permission or authority to be on the property. An invitee is one who comes to the property at the express or implied invitation of the possessor.[69] Further refinement of these basic concepts has been found in cases that have distinguished between public invitees and business invitees.[70] To determine which of these categories applies, two tests have been developed, the economic benefit test and the invitation test.[71] Under the economic benefit test, the possessor's financial or economic interest in the visit is sufficient to create an implied invitation to come onto property, thereby creating the status of invitee. Economic advantage to the possessor of the land must be actual or potential, real or fancied to support a conclusion of invitee status.[72] This advantage need not be immediate as indirect or future advantage are sufficient.[73]

Under the invitation test, the benefit to the possessor from the visit is not an essential consideration in the analysis.[74] Under this test, a person who enters another's property becomes an invitee when he or she is led to believe the premises were open for such use.[75] To determine if an invitation exists, express statements and implications drawn from

words or conduct can be used.[76] Situations where an invitation has been implied include an owner's willingness to permit habitual use and holding out the premises as open to the general public.[77] Once finding the existence of an invitation, an equally important consideration is the scope of the extended invitation.[78] Extending beyond the scope can result in a loss of invitation and a change in status. In cases of an express invitation, determining the scope is substantially easier than in the case of an implied invitation.

A licensee is an individual who has permission to be on another's property and may have even entered in response to an invitation to do so. In distinguishing a licensee from an invitee, if a person enters the property of another in response to an invitation that related to the business of the party who gives it or is for the mutual business advantage of both parties, the person entering is an invitee.[79] If, however, the invitation is for the pleasure, convenience, or benefit only of the person to whom the invitation is extended, such person is a licensee.[80] Another way of viewing the status of licensee is to consider such persons as individuals privileged to enter or remain on land by virtue of a possessor's consent,[81] a concept which differs from an invitation. To find whether permission existed, express statements are considered as well as permission that can reasonably be implied from the possessor's conduct.[82] For example, if a landowner who is aware of others using the property takes no action to exclude such persons it can be argued that the landowner granted implied permission to continue such use. In this example, the crucial determination of who received implied permission depends on the extent of the possessor's knowledge.[83] If a possessor has knowledge of a use and takes no action to stop it while it continues, the implied permission is extended to those whom the possessor knows are using the premises. Implied permission can-not generally be extended to others who are unknown to the possessor, unless if use is so frequent and widespread that the public in general assumes it has been granted permission to use the property.[84]

A trespasser by comparison is one who enters another's real or personal property without right, lawful authority, or express or implied invitation or license.[85] Whether entry is made for illegal or wrongful purpose, an innocent purpose, no apparent purpose, or even by mistake has usually been considered immaterial to the determination that the entrant is a trespasser.[86] Age of the entrant is likewise insufficient to change the entrant's status as a trespasser, although some states follow special rules for determining a possessor's liability for injury to trespassing children.

Some jurisdictions do not follow the common law rule that hold unintentional entrants as trespassers.[87] Such cases conclude that unintentional, non-negligent conduct do not rise to the level of a trespass and therefore such status should not attach to it.

The injured person's status at the time of injury determines the duty owed by the possessor to the injured person. Once having entered another's property, the status of a person can change from that at time of entry.[88] If an invitee exceeds the scope or purpose of the invitation by proceeding into an area not included in the invitation, the status of invitee may change to a licensee or even a trespasser depending on the circumstance.[89] Likewise, a person who was originally classified as a trespasser may be able to improve his or her classification. For example, if a landowner comes upon a trespasser and makes no effort to expel him from the owner's property, the owner's conduct may impliedly permit the trespasser to remain on the property, thereby raising the entrant's status to that of at least a licensee.[90]

Having determined the status of the injured party at the time of injury, the next step is to determine the duty owed by the person in possession of the property to the injured party. Under the traditional approach, this duty varied considerably.

In regard to a trespasser, a person in possession of land generally owes such person a duty to avoid injury to the trespasser by willful, wanton, or intentional conduct.[91] In a general context willful and intentional conduct refer to those acts that are knowingly

performed with the intent to bring about the natural consequences of the act. Acts which are considered to be "wanton" are those which are done in reckless disregard or complete indifference for the safety of others, such as performing an act that presents a risk of harm or injury to others in a way that shows no concern for the effect such an act will have.[92] In regard to a licensee, a possessor owes a duty to warn the licensee of those dangers that are known to the possessor. In regard to an invitee, the possessor owes a duty to inspect his or her premises to determine its condition and to correct defective or dangerous conditions or warn invitees of these dangers.[93] Of these three duties, the duty owed to a trespasser is minimal: while the duty owed to licensees is more involved it is less than the detailed obligation that a possessor of land owes to someone who is classified as an invitee. In some jurisdictions, the soundness of varying a possessor's duty on the basis of the injured party's status has been questioned, especially in respect to the distinction between licensees and invitees that some courts find to be shadowy and indistinct.[94] Dissatisfaction with the traditional common-law view has led to the development of what some have called the modern doctrine.

In other situations determinations have been made that the status of the injured party will be immaterial where the injury results from certain types of situations described by statute or where a statute establishes liability in specific situations irrespective of the status of the injured party.[95] To the extent that an injured person is aware of the dangerous condition or instrumentality that produces injury, a possessor's duty to the injured party will be affected. Under the traditional common law rules, the duty of the possessor of land is predicated on the possessor having superior knowledge of the dangerous condition.[96] To the extent that the danger to a licensee or invitee is obvious, the duty of the possessor to such person is lowered.[97] In some jurisdictions, this concept is extended to dangerous conditions that could have been and should have been discovered in the exercise of ordinary care.[98] If, however, the possessor has reason to believe that an entrant's attention will be distracted from the obvious danger and therefore placed in a position of risk despite the known or obvious danger, the possessor incurs an obligation to protect the entrant.[99]

An issue of particular concern to landowners in a jurisdiction that follows the traditional common-law rules involves the duty owed by a possessor to trespassing children. By reason of their inexperience and immaturity, children are more likely to explore strange places without permission and to ignore property boundaries as limits on their ability to wander. Under normal circumstances, presence on another's land without permission would classify the entrant as a trespasser. To such a person the possessor owes a very limited duty. In the case of trespassing children, such a classification would result in a lower obligation for landowners and increased risk to children.

To address this concern, two theories have developed to clarify a possessor's obligation to such children, the attractive nuisance theory and the rule of the Restatement of Torts, Second. Both of these rules focus on the nature of the condition or instrumentality that causes injury to children. To the extent that these rules apply, they provide special obligations on the part of a possessor owed to a child. If the rules do not apply, the normal rules for determining a possessor's duty to trespassers, licensees, and invited would apply to child's status at the time of the injury.[100]

Under the attractive nuisance doctrine, one who maintains on his or her premises a condition, machine, or instrumentality that is dangerous to young children because of their inability to appreciate the danger associated with these items and because they may be attracted to them, is under a duty to exercise reasonable care to protect these children against the dangers of the attraction.[101] Under the Restatement, Torts 2d Section 339 rule a possessor of land is subject to liability for physical harm to trespassing children caused by an artificial condition upon the land if: (a) the place where the condition exists is one upon which the

possessor knows or has reason to know that children are likely to trespass; (b) the condition is one of which the possessor knows or has reason to know will involve an unreasonable risk of death or serious bodily harm to the children; (c) the children because of their age do not discover the condition or realize the risk involved in coming in contact with the artificial condition; (d) the utility to the possessor of maintaining the condition and the burden of eliminating it are slight as compared to the risk to the children involved, and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children. In some jurisdictions, the Restatement rule has been recognized as the applicable law, while in others it replaced the attractive nuisance doctrine as applicable law. While many states have adopted either one of these special rules, a number of states have rejected both concepts in favor of applying the same rule to children as that applied to adults.[102]

In jurisdictions where either of the special rules apply, particular care and attention should be directed to satisfying the requirements of the rule. For example, under the attractive nuisance doctrine the attractive nature of the instrumentality is a crucial requirement, while the Restatement rule does not include such a requirement.[103] While each rule is described as being applicable to situations where children are classified as trespassers, it has been pointed out that when a child is on land as a licensee or invitee, the owner or possessor is no less obligated to anticipate and take into account a child's natural curiosity, and inability to appreciate danger or protect one's self from it.[104]

Modern Rule of Reasonable Care

In contrast to the traditional common-law rule, a number of courts have rejected the notion that a possessor's obligation to an entrant depends on the relationship between the injured person and the possessor. The leading case supporting this position is *Rowland v. Christian*[105] which held that under California statutory law, the traditional distinction between trespassers, licensees, and invitees is not the controlling factor in determining the scope and extent of the duty of care owed by landowners to entrants. Instead, the court held that the proper test to apply in determining liability under the California Civil Code is the way a landowner manages his or her property. A possessor of land acts as a reasonable man when steps are taken in reaction to the probability of injury to others.[106] The status of the injured person as a trespasser, licensee, or invitee is specifically declared not to be determinative of what duty is owed by the possessor to the entrant. The California Civil Code[107] declares that everyone is responsible, not only for the results of willful acts, but also for injury suffered by another as a result of a lack of ordinary care or skill in the management of property, except so far as the injured party has willfully or by the failure to exercise ordinary care, brought the injury upon himself or herself.[108] Although the existence of this statutory duty plays a major role in the court's decision, the court notes that the common law distinctions are not justified in light of modern society.[109] Complexity and confusion arise from attempts to apply just rules in modern society with ancient terminology.[110] In the Rowland case, the court held where the occupier of land is aware of a concealed condition involving, in the absence of precautions, an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the judge or jury can reasonably conclude that a failure to warn or to repair the condition constitutes negligence and liability for injury or damage caused thereby. A person who enters another's property should reasonably be entitled to rely on a warning of the dangerous condition so that he will be in a position to take special precautions when he comes in contact with it.[111]

A number of other states have adopted similar rules that disregard the common-law classifications in favor of a rule that focuses on the reasonableness of the possessor's conduct under all of the circumstances that gave rise to the incident.[112] Some jurisdictions have

taken other approaches such as disregarding the common law classifications and duties, but only in those situations where the person in possession of property is aware that someone is on his or her property.[113] Other courts have held that the common law distinctions between invitees and licensees is not determinative of the duty owed by a possessor of land to such individuals. In these jurisdictions a possessor is under a duty to exercise reasonable care under the circumstances.[114]

These cases recognize the difficulty in categorizing people who are on another's property in a lawful manner to conduct a lawful activity. For such individuals, the common-law rules that distinguish between a duty to warn and a duty to inspect and make safe can lead to unjust results considering the injured person is there lawfully.

Those states which still follow the traditional common-law rules outnumber those which have disregarded it. Those states which follow the modern rule, however, have greater flexibility in reaching results which many will consider to be just for all circumstances. Under the traditional common-law view, obtaining a just result may depend on fitting an injured person into a classification and then determining whether the landowner's conduct measures up to the duty owed to a person in that classification.

When confronted with arguments that the traditional common-law rule should be replaced with the modern rule, courts have noted that although the number of states adopting the modern view is growing, it can hardly be said that the bandwagon is rapidly running out of room.[115] Therefore many courts have chosen to stay with the traditional common-law rules despite arguments raised by legal theorists and others who favor its replacement by the modern rule. Such courts have continued to conclude that the prevailing law with respect to a trespasser, is that a possessor is not liable for injury to trespassers caused by his or her failure to exercise reasonable care to put his land in a safe condition or his failure to guard against concealed pitfalls.[116] In regard to licensees who enter another's property for their own purposes with express or implied consent of the person in possession, legal theorists agree that such persons, as licensees, have no right to demand the land be made safe for their reception and must assume the risk of whatever they encounter on the property and look out for themselves.[117]

Legislative Response: Recreational Use Statutes.

Recognizing the concern of landowners for increased liability risks, the cost associated with covering such risks, and the demand for recreational space for leisure activities, a suggested state statute was developed in the mid 1960s to balance these divergent concerns. To date 40 states have decided to adopt such statutes to resolve issues applicable to their own state's situations. Among the northeastern states that have such statutes are New York,[118] New Jersey,[119] Maine,[120] Vermont, New Hampshire, Massachusetts,[121] Connecticut,[122] Pennsylvania,[123] Ohio,[124] West Virginia, Delaware[125] and Maryland.[126]

Although each statute is unique in its own right, a comparison of some critical provisions such as coverage, exclusions to coverage, and key terms may be helpful to understanding the practical impact the statutes will have. In making this comparison I will refer to statutes in Pennsylvania, New York, New Jersey Connecticut, Maine and Ohio. Significant judicial interpretation of these statutes will also be noted as it relates to the areas of inquiry.

Landowners Covered by Recreational Use Statutes

The first point of comparison deals with the question of coverage. In each of the six statutes considered coverage was extended to an owner, tenant, lessee occupant or person in control.[127] Ownership of the land is not necessary in order to receive the benefit of the act In general, each statute declares that its purpose is to encourage those who own possess, or occupy land to make the land available to members of the general public for recreational purposes. Many of the statutes define

or describe the type of activity that is intended to be carried out on the property, such as hunting, fishing, swimming, boating and camping. New York includes motorized vehicle activities, snowmobile operations, hang gliding and wood cutting on a noncommercial basis.[128] New Jersey includes language that would permit the land to be used for instruction and practice of any of the recreational activities described in the statute.[129]

In addition to describing the type of recreational activities conducted, each of these statutes require that the landowner make his or her land available without charge or fee to the user in order to be brought under its protective application. In considering the question of what type of fee or charge would trigger loss of the acts' benefit, fees labeled as easement fees and license, fees paid to an owner by property owners whose land abut a recreational lake were not sufficient to force the lakeowner's loss of protection.[130] Likewise rental fees paid by a state lessee to a landowner lessor are specifically excluded from those charges which will remove the protective application of the act.[131] An example of charges which did result in the loss of protection is membership dues paid to a recreation club in exchange for the right to use property, cut trees and take wood from it.[132]

In regard to the type of land that is covered by the Act, the New Jersey statute has been interpreted to apply only to nonresidential, rural or semi-rural land; land which bears a resemblance to the true outdoors.[133] In a Pennsylvania case where a child drowned in an indoor swimming pool in suburban Philadelphia, the court held that although swimming was one of the listed recreational activities, the Act was not intended to apply to indoor recreational facilities. References in the Act to "buildings attached to land" were not intended to apply to indoor recreational facilities.[134] On this basis, the decision was reached to deny application of the act to these facts. In New York, the statute has been interpreted to exclude from its application land that is situated in or around highly developed areas, therefore leaving only that land located in remote, undeveloped areas to receive benefit of its application.[135] In Ohio, the Supreme Court has held that a member of the public who uses a university-owned gymnasium is not a "recreational user,"[136] but a social guest attending pool party is a recreational user under the statute.[137]

From these references and cases a number of points can be drawn. First, each statute will control as to application of the act to specific activities. Among the various states, different lists of activities may be found and such lists may become important in tying the activity to the act. As to the location of the land and the question of coverage, the legislature's intent in adopting the statute will be important to conclude whether the coverage should be broad or narrow. In the Pennsylvania case, the court chose to side-step the urban versus rural question by concluding that the activity took place at an indoor facility while the act was intended to cover many outdoor activities. Other states such as New York and New Jersey are more direct in their approach and they plainly hold that the act was intended to cover only a specific type of property.

Benefits to Landowners Covered by the Act

Statutes of this type generally provide that owners, lessees, or occupiers who are covered do not owe a duty to those using their land to keep the land, or any part of it that is available to the public, safe for entry or to give any warnings of dangerous conditions, use structures or activities on the land to those who enter for the protected activities and purposes. In addition, owners, lessees, or occupiers who are covered by the act also receive the benefit of additional protection. These protections state that covered individuals do not extend to those using the land any assurance the premises are safe for such purpose or any purpose, confer status as a licensee or invitee on any person to whom a duty of care is owed, or assume any responsibility for or incur liability for any injury to persons or property caused by any act or omission.[138]

Actions for Which Landowners Remain Liable

Although these acts generally lessen an owner's duty to those who enter his or her property, they don't eliminate responsibility completely. For example, each of the reviewed statutes retains liability for owners, lessees, and occupiers who injure others through their willful or malicious failure to guard or warn against a dangerous use, structure or activity.[139]

This statement has been referred to as a restatement of the general common-law duty owed by an owner or possessor to a licensee.[140] In states that have rejected the traditional common-law rules in favor of the modern rule of reasonable use under the circumstances, the recreational use statute resurrects the common-law standard for application in cases where the statute applies.[141] In this context willful and malicious acts of an owner, occupier or possessor include those acts done with an intention to injure another or those done in reckless disregard for the safety of those who come onto the property.

In addition to these areas of continuing liability each of the statutes reviewed states that an owner, occupier or possessor remains liable for injuries suffered by any person who was charged a fee for the use of the premises. In cases where such a fee is charged the owner, occupier, or possessor enters into a business relationship with the entrant and owes such person a duty to make the premises safe for entry or warn of any known but concealed dangers.

Some statutes go beyond these situations. New York, for example, does not limit the liability of an owner, lessee, or occupant of a farm for injuries or damages caused by acts of gross negligence.[142] Likewise, if an owner is otherwise obligated to exercise care in use of his or her land, such obligations and responsibilities continue unaffected by this statute.[143]

Legal commentators have pointed out that by making land available to others for recreational purposes, the landowner, lessee, or occupier is put on notice that additional people will be on the premises. Therefore, in conducting its own activities on the property the owner, tenant, or occupier will have to exercise reasonable care for the protection of these individuals.[144] In this context reasonable care may require additional lookout for those entering the property or a proper warning.[145] Those using the land cannot require the owner to change his or her use of the land to accommodate the entrant's intended use. If dangers are known or obvious the entrant has received all that he is entitled to and must act to protect his or her own interest.[146]

Conclusion

Landowners seeking profitable uses for their land must consider the effects which these legal liability issues can have on any of their plans. In introducing a new use to a tract of land, the owner or possessor should evaluate the off-property effects of the use when selecting it and deciding where it should be located. In making land available for use by others, the owner or possessor must recognize that at least some obligation will exist to protect the safety and interests of those coming on to the property in response to an invitation or with permission. This obligation can be as minimal as a warning of known dangerous conditions or things located on the property or as detailed as a complete inspection of the premises to uncover dangerous conditions in order to correct them or warn those entering about the problems. Understanding this obligation before the new activity begins will make complying with the obligation a great deal easier to achieve.

If recreational or outdoor use activities are considered statutory modification of the premises, liability

rules may have an impact on the obligations of an owner. A full review of the requirements for application of the statute, the protections afforded to those who are eligible and the exclusions from coverage will aid in identifying the benefit to be gained from the act. It should be noted that most of these laws do not apply to activities that are conducted on a fee or charge basis. Therefore, many of these acts will not apply to activities that are intended to generate income. Reviewing the act in question can resolve this issue.

Endnotes

1. Since it defines a possessor's responsibility for injury or damage suffered by those on the possessor's premises.

2. 58 Am. Jur. 2d Nuisance, Section 1; Sullivan v. Waterman 20 R.I. 372, 39 A 243 (1898).

3. 58 Am. Jur. 2d Nuisance, Section 2.

4. 58 Am. Jur. 2d Nuisance Section 3; Bohan v. Port Jarvis Gas Light Co., 122 N.Y. 18, 25 NE 246 (1890).

5. Am. Jur. 2d Nuisance, Section 5; Briggs v. North Towanda, 213 App. Div. 781, 210 NYS 643.

6. 58 Am. Jur. 2d Nuisance Section 13; Whitmore v. Orono Pulp and Paper Co. 91 Me. 297, 39 A 1032 (1890) Pennsylvania Co. v. Sun Co. 55, ALR 873.

7. Ackerman et al v. Heinsohn No. 1982-CE-8000 (Northampton County, PA, July, 1983).

8. 58 Am. Jur. 2d Nuisance Section 8; Mandel v. Pivrich 20 Conn Supp. 99, 125 A2d 175 (1956).

9. 58 Am. Jur. 2d Nuisance Section 6.

10. Id.

11. Id., Harris v. Poulton 99 W.Va. 20, 127 SE 647, 40 ALR 334 (1925).

12. 58 Am. Jur. 2d Nuisance Section 6. Riggins v. District Ct. 89 Utah 183, 51 P2d 645 (1935).

13. 58 Am. Jur. 2d Nuisance Section 6. Acme Fertilizer Co. v. State 34 Ind App. 346, 72 NE 1037 (1905).

14. 58 Am. Jur. 2d Nuisance Section 20; Camfield v. United States 167 U.S. 518; McCarty v. Natural Carbonic Gas Co. 189 N.Y. 40, 81 NE 549 (1907).

15. 58 Am. Jur. 2d Nuisance Section 22; Wingert v. Winn-Dixie Stores, Inc. 242 S.C. 152, 130 SE2d 363 (1963).

16. 58 Am. Jur. 2d Nuisance Section 22; Sans v. Ramsey Golf and Country Club, Inc. 29 N.J. 438 149 A2d 599, 68 ALR2d 1323 (1930).

17. 58 Am. Jur. 2d Nuisance Section 23; Soukup v. Republic Steel Corp. 78 Ohio App. 87, 66 NE2d 334 (1946).

18. 58 Am. Jur. 2d Nuisance Section 23; Patterson v. Peabody Coal Co. 3 Ill. App 2d 311, 122 NE2d 48 (1954).

19. 58 Am. Jur. 2d Nuisance Section 23.

20. 58 Am. Jur. 2d Nuisance Section 28.

21. Hutcherson v. Alexander 264 Cal. App 2d 126, 70 Cal. Rptr. 366, 38 ALR3d 636 (1968).

22. 58 Am. Jur. 2d Nuisance Section 29; O'Neil v. Carolina Freight Carriers Corp. 156 Conn. 613, 244 A2d 372 (1968); Snyder v. Philadelphia Co. 54 W. Va. 149, 46 SE 366.

23. 58 Am. Jur. 2d Nuisance Section 36; Clinic and Hospital, Inc. v. McConnell 241 Mo. App. 223, 236 SW2d 384, 23 ALR2d 1278 (1951).

24. 58 Am. Jur. 2d Nuisance Sect. 36.

25. Id.

26. 58 Am. Jur. 2d Nuisance Section 41; State ex rel Chalfin v. Glick 113 Ohio App. 23, 177 NE2d 293 (1960).

27. 58 Am. Jur. 2d Nuisance Section 47; Hamilton Corp. v. Julian 130 Md. 597, 101 A 558, 7 ALR 746 (1917).

28. 58 Am. Jur. 2d Nuisances Section 47.

29. 58 Am. Jur. 2d Nuisance Section 47; Rogers v. Elliott 146 Mass. 349, 15 NE 768.

30. 58 Am. Jur. 2d Nuisance Section 49; Ahern v. Steele 115 NYS 203, 22 NE 193; McMechan v. Hitchman - Glendale Consol. Coal Co. 88 W.Va. 633, 107 SE 480.

31. 58 Am. Jur. 2d Nuisance Section 49; Kurtigian v. Worcester 348 Mass. 284, 203 NE2d 692 (1965).

32. 58 Am. Jur. 2d Nuisance Section 49; Miller v. Iles 72 Ohio L. Abs. 30, 132 NE2d 648 (1955).

33. 58 Am. Jur. 2d Nuisance Section 56; Hill v. Way 117 Conn. 359, 167 Al; McDonald v. Dendon 242 Mass. 229, 136 NE 264, 26 ALR 1243.

34. 58 Am. Jur. 2d Nuisance Section 56; Sam Finley, Inc. v. Waddell 207 Va. 602, 151 SE2d 347 (1966).

35. 58 Am. Jur. 2d Nuisance Section 56; Fox v. Ewers 195 Md. 650, 75 A2d 357 (1950).

36. 58 Am. Jur. 2d Nuisance Section 98.

37. 58 Am. Jur. 2d Nuisance Section 99; Lowton v. Steele 119 N.Y. 226, 23 NE 878, aff'd. 152 U.S. 133, 38 L.Ed. 385, 14 S.Ct. 499 (1893).

38. 58 Am. Jur. 2d Nuisance Section 100; Northlake v. Elmburst 41 Ill. App. 2d 190, NE2d 375 (1963).

39. 58 Am. Jur. 2d Nuisance Section 102.

40. 58 Am. Jur. 2d Nuisance Section 103; Lowe v. Propect Hill Cemetary Assoc. 58 Neb. 94, 78 NW 488.

41. 58 Am. Jur. 2d Nuisance Section 120; Kentucky West Virginia Coal Co. v. Lafferty (CA6 KY) 174 F2d 848, 10 ALR2d 661 (1949).

42. 58 Am. Jur. 2d Nuisance Section 121; Stratford Theater, Inc. v. Stratford 140 Conn. 422, 101 A2d 279, 41 ALR2d 1060 (1953).

43. Id.

44. 58 Am. Jur. 2d Nuisance Section 122; Manning v. Woodlawn Cemetary Corp. 239 Mass. 5, 131 NE 287.

45. 58 Am. Jur. 2d Nuisance Section 122; Gorman v. Sabo 210 Md. 155, 122 A2d 475 (1956).

46. 58 Am. Jur. 2d Nuisance Section 122.

47. 58 Am. Jur. 2d Nuisance Section 124; Widmer v. Fretti 95 Ohio App. 7, 116 NE2d 728 (1952).

48. 58 Am. Jur. 2d Nuisance Section 150.

49. 58 Am. Jur. 2d Nuisance Sections 150, 151.

50. 58 Am. Jur. 2d Nuisance Sections 155, 156; Reyburn v. Sawyer 135 N.C. 328, 47 SE 761.

51. 58 Am. Jur. 2d Nuisance Section 159; Grey ex rel Simmons v. Patterson 60 N.J. Eq. 385, 45 A 995 (1900).

52. 58 Am. Jur. 2d Nuisance Section 170; Westville v. Whitney Home Builders 32 N.J. Super 538, 108 A2d 660 (1954); 42 Am. Jur. 2d Interjunctions Section 259.

53. 58 Am. Jur. 2d Nuisance Section 170.

54. 58 Am. Jur. 2d Nuisance Section 170; Carson v. State 221 Ga. 299, 144 SE2d 384 (1965).

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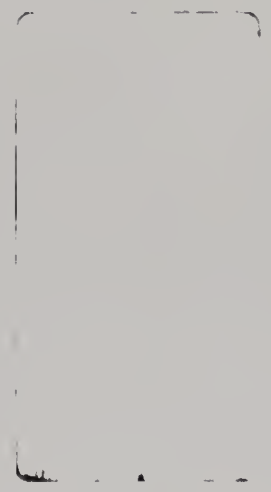

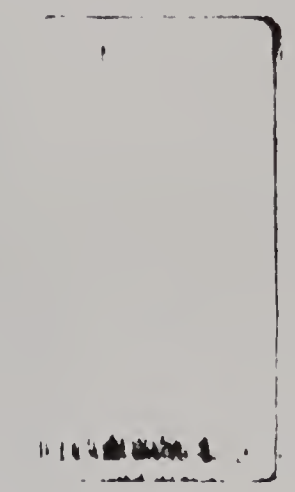

Waterfowl: An Alternative Income Producing Option for Recreational Access

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Owners/Managers, M & M Lodge, Inc.
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Abstract

M & M Hunting Lodge, Inc., in Delaware, is a full-service hunting facility for waterfowl. It has been in business for twenty years. The business was started on an old run-down dairy farm and transformed into one main lodge, one conference center and one executive lodge. Twelve farms are hunted by about 1,000 hunters each year. Customers are mostly corporate executives entertaining their clients. Land and resource management are the keys to success and are discussed from points on what to plant to how to write a hunting lease. Marketing strategies are covered from how to gather a mailing list to which magazines to advertise in. Future ways to expand are also listed. M & M Hunting Lodge, Inc. has gone from a dream to a reality during the past twenty years and continues to grow and change as necessary to meet the needs of clients.

Description and History

M & M Hunting Lodge, Inc. includes one lodge, one conference center and one executive lodge. We own 300 acres and lease an additional 8,000 acres of hunting properties. Located on the east coast of Delaware about 10 miles north of Dover, we are 1-1/2 hours from Philadelphia International Airport and about 2-1/2 hours from Washington, D.C. Our facility borders the Woodland Beach State Wildlife Refuge. Our hunting properties surround Bombay Hook National Wildlife Refuge.

In 1968 Isadore and Philomena Matarese bought an old dairy farm in Delaware. Isadore had hunted waterfowl nearby and thought this farm would be a good land investment. The farm consisted of an old farmhouse and a run-down barn, and had never been hunted. In the years to come great amounts of work were done to the land and the buildings. We are still working on the buildings. This year alone we renovated our main lodge with paint, carpeting, windows and new dining facilities.

Since the farm was located next to the state refuge, it was a natural for goose hunting. In 1969 the farm and farmhouse were rented out to a private club for a seasonal fee. In 1970 M & M started to take day hunters with a peak volume of about eight a day. We had three shooting locations. During this period the old farmhouse was being renovated into a lodge, we employed a cook/housekeeper but no guides. In 1975 a wing was built onto the lodge which brought capacity up to twenty-eight hunters. That was the start of renting additional farms to accommodate the hunters. In 1980 the Conference Center was built to handle the demand for additional hunters and to have an up-to-date meeting facility for our corporate clientele. After building the Conference Center we solicited corporate clients to introduce them to M & M. We wanted to get across the idea that a hunting trip could be looked at the same way a golf outing or a fishing trip is considered in the business world. Our executive lodge houses eight to ten people and is leased by corporations throughout the year guaranteeing us a minimum rental. It provides total privacy for the renting group.

In 1988 we hunted on twelve farms and had 55 different hunting locations.

Services Offered

We offer wild goose and duck hunting from November through January each year. During September we offer dove hunting. Our Conference Center is available for meetings, banquets, seminars and overnight retreats throughout the year. We also offer pits and blinds for rent by the season.

We offer two different hunting packages: hunting, lodging and meals; and, day hunting only.

Services at the lodge include: professional guide service; licenses and stamps; a packing facility for cleaning and packaging game for air shipments; rental guns; The Hunt Shop–a fully stocked pro shop; a trap range; heated pits or blinds.

In conjunction with our goose hunting we serve three meals a day in our dining room. Our bill of fare includes surf and turf, seafood combo and a wild game dinner. We use smoked game as our hors d'oeuvres. Since we are near the shore many people look forward to getting seafood during their stay with us. We can handle 100 overnight guests and an additional 50 day hunters. We employ 35 guides, 15 cooks and housekeepers, 2 full-time clerical personnel and 4 other workers.

Our customers are about 60 percent corporate and 40 percent non-affiliated hunters. We recruit our hunters by word of mouth, by advertising in national hunting magazines, by entertaining outdoor writers, by direct mail brochures and newsletters, by trade shows and by donating hunting trips to waterfowl organizations such as Ducks Unlimited and the National Wildlife Federation. Our customers come from all across the country with a great majority coming from the South where waterfowl are not as plentiful as they used to be. Our customers' annual median income is over $50,000; they are in middle to upper management or owners of their own businesses. Our typical hunters does not want to be bothered with renting a farm or setting out their own decoys; they thoroughly enjoy the gentlemen's hunt.

We are successful because we are a family-run organization that doesn't mind going the extra mile to see things accomplished. Our employees carry that spirit for us so that our customers feel like they are coming home year after year. We believe in service and that extra service is what makes us different. Even if the geese don't cooperate with us on a given day, our customers are treated wonderfully by our staff; our food is superb and our lodge is clean.

Marketing

Advertising in well-known hunting magazines has proved to be very effective for getting new customers. We advertise in *Field & Stream*, *Outdoor Life*, *Ducks Unlimited*, *Wildfowl Gun Dog*, *American Hunter* and sometimes *Peterson Hunting*. Our ads run from July through December of each year. Each ad contains a list of services offered, address for a free brochure and the telephone number Once a person inquires about us, we follow up with a phone call or letter and a brochure. In our business a brochure is very important. We started with a mimeo-graphed piece of paper 20 years ago. This year we did our first color brochure with pictures.

Word of mouth is always the most effective seller. We strive to keep our customers happy and coming back so that they will spread the word. When we have a corporate client we always ask what other division heads we could contact, get their names and numbers and try to make another sale.

We do some local newspaper advertising to rent our seasonal positions and to attract local dove hunters. We also go to trade shows with the Chamber of Commerce and use their booth to sell our service. By donating to organizations who use our hunts as fund raisers we usually develop a good repeat customer. Each year we entertain many outdoor writers and also keep a good relationship with Delaware's Division of Tourism and the Division of Fish and Wildlife.

Our phone is one of our main means of sales. How the person who is inquiring is treated on the phone may be the difference between hunting at our facility or somewhere else.

Business Management

M & M incorporated in 1976, and we are run like most businesses–to produce a profit. Expenses are only incurred to make a better hunt or to produce a better service. We only rent farms that are productive or have the potential to be productive if managed properly. We book our hunts all year long with the greatest demand being for the opening week. We require a 50 percent deposit to be sent before the booking is confirmed. This enables us to generate income all year long. One of our major expenses is land leases and conservation plantings which are discussed later. As a result of mandated reductions in bag limits and hunting days, we added dove hunting to supplement our income.

We gather information on every hunter and keep detailed records of every hunt. Each morning the guide is handed a guide sheet that tells him what party he has and where they are to hunt. It also is a means for us to gather information about the farm and the hunt. The guide is required to turn it back into the office at the end of each day. It has spaces for recording the number of birds killed. It also has a place for the number of birds missed. This part lets us know if there were birds available and whether the customers were poor shots. At the end of the season this information is tabulated so that we can make assessments for the next season. This gives us good bargaining power when we want a reduction in farm rent if the farm has not been productive. This information is entered daily on a computer then extracted as needed.

The computer also holds the name of every person who has inquired about us and every person who has hunted with us. From this information we construct our mailing lists.

Our company has three main divisions. The food service division handles the food and the lodging parts of our business. The second one is our field management division which handles anything outside of the lodge Then we have the office division which handles all bookings and reservations. accounts payable and accounts receivable.

Land Leases

One of the important items in the business management section is negotiating a hunting lease. How to assess what a farm is worth for hunting can be difficult because of the unknowns. Some of the guidelines used for assessment are:

1. Location – is the farm near any major concentrations of waterfowl i.e., a refuge or holding area?
2. History – Has the farm been hunted before? What was the success rate? Why is it available?
3. Ponds – Are there any existing ponds? Are there any low spots for a pond?
4. Structures/roads – Are there any pits or blinds on the farm? Are they in good condition? Are there access roads to the hunting positions? Can we put pits in, and if so, do we have the right to remove them if the lease is terminated?
5. Crops – What kind of crops are to be planted and what kind of input can we give, i.e., crop location and harvest schedule.
6. Cost – It is determined by the above factors; we pay anywhere from $500 to $15,000 for farms.
7. Payment schedule – We pay for our leases during hunting season when we have good cash flow.
8. Term – the first year we take a one year lease with the right of first refusal. The second year we usually negotiate for a five year lease with the right of first refusal

Regulations

Our hunting seasons are set by federal guidelines each July and then the state Department of Fish and Wildlife structures our season within the federal guidelines. The regulations state how many days we can operate our hunting business and what we can hunt. From a business management standpoint this is one of the most negative aspects our operation faces. We try to give input into the meeting when the state is setting

the seasons. To accommodate the hunters who like to plan in advance, Delaware is now setting a base season sometime in March. By a base season, they give us the minimum amount of days, the minimum bag limit and also the starting date. They then can increase it if they see fit after the federal guidelines are established in July.

Our guides and hunters are also regulated by the state and federal guidelines which tell them what they can hunt, what kind of shells to use, what hours they can hunt, and daily bag and possession limits. Our picking facility is also regulated by federal guidelines.

Labor

One of the most difficult tasks is hiring seasonal employees. We get most of our guides through word of mouth. A prospective guide, is screened very carefully because he is our representative out in the field. We make sure they are safe hunters themselves. Our customer spends more time with them than with anybody else in our operation. Once hired they go through a training and trial period. Most of our guides are watermen, trappers, retirees or college students. Hiring seasonal cooks and housekeepers is much more difficult.

We don't have a constant number of people staying at the lodges and the season splits. This is one of the hardest things to plan for. One day you may have 90 overnight guests and the next day you may have 25. We are fortunate we have found some good employees who get seasonal summer work nearby. Cooks and housekeepers are hired through newspaper advertising.

Legal Aspects

At M & M we are very safety conscious. No party goes out to hunt without one of our guides. Before each hunt the guide has a safety talk with our customers, even if they are experienced hunters. The talk concerns loading and unloading guns, where to position guns in the blind, safe gun handling and safe shooting zones. For the inexperienced hunters we recommend a couple of rounds of trap to become familiar with their gun.

One of our greatest fears is a hunting accident, but in our 20 years in business we have never had one. We are covered with a $4 million liability policy. We do not take any hunters out in a boat; all of our hunting positions can be reached on foot.

Resource and Land Management

This area of operations is one of the reasons we are successful. We have observed waterfowl for many years. We have planted many types of feed, and have evaluated many ways to see what worked the best. Waterfowl have to be managed as a crop. Feed is the most important factor in good waterfowl management. On each of our farms corn is the main crop. We write in the leases that corn must be planted and where and when it gets picked. We do this to make sure there will be feed for the birds during and after the season.

The next most important crop is wheat or barley. We prefer wheat but the farmers prefer barley because they can harvest it earlier and plant a second crop in the summer. We plant wheat in 10-acre blocks around most of our field hunting positions. If the corn is gone the birds will have something to eat. If any land is set aside we sign it up in the wildlife program and then plant sunflowers, sorghum, buckwheat, millet and Austrian peas. These feeds can be eaten by all types of wildlife. All of the extra plantings are done at our expense.

The next item waterfowl need is water. All of our farms have ponds on or near them. We put many of the ponds in ourselves with our equipment. We also encourage the farmers to put in ponds through the Soil Conservation Service program. Many ponds are used as holding areas, meaning they never get hunted. They give the waterfowl a place to come into the farm safely This is a very effective management technique.

Waterfowl are like any other crop—if you don't fertilize or spray you don't get a premium crop. If you don't manage waterfowl you don't get good hunting

Besides planting and holding areas, our next best management tool is resting and rotating our hunting locations. We never overhunt a farm. If it looks like a farm is getting burned out, we shut it down, let the birds get back in and then go back and hunt it.

We never shoot large flocks of birds and we don't let our hunters shoot too high.

Expansion

Our next decision is to determine how we can compensate for a shorter hunting season. At this point we are at a crossroad. We have considered putting in a sporting clays range and also starting a shooting preserve in Delaware. We are probably leaning toward a waterfowl/upland combination hunting package. In Delaware we are working through the legislature to change a law which requires the acreage for a shooting preserve to be 500 acres and fenced. We would like to get the required area reduced to 300 acres. If that passes, we could hunt upland game from September through March each year. We already have the lodges and also a mailing list of about 18,000 hunters. In our state there is only one sporting clays range and only one shooting preserve.

Waterfowl: Income Potential and Problems

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Abstract

Providing waterfowl hunting for a fee is an opportunity-oriented business for those landowners with wetlands that have a tradition of waterfowl use, and for those whose land is near federal, state or private wildlife management areas that attract concentrations of migrating and wintering waterfowl. Waterfowl hunting occurs in all the eastern states but hunters are concentrated in only a few. Hunters and waterfowl are declining in numbers or are shifting their distribution northward from the southern states. Waterfowl hunters experience greater difficulty gaining access to land to hunt, and with crowding on hunting areas. Hunters are willing to pay fees ranging from $7 to $250 per day, to hunt waterfowl and to enter into annual lease agreements with landowners owning quality waterfowl habitat for fees of $10 to $40 per acre. Landowner income options include: annual lease arrangements, daily rentals and full-service guiding services. Costs to provide waterfowl hunting vary from none for an "as-is" annual lease, to thousands of dollars for quality, guided waterfowl hunts over flooded food impoundments. Planning for a commercial hunting business, and investing in waterfowl habitat is made difficult and uncertain by the annually changing waterfowl hunting regulations, and by the long and inflexible regulation setting process. Natural resource agencies responsible for managing waterfowl populations find themselves in conflict with those publics with a financial stake in commercial waterfowl hunting whenever waterfowl season restrictions are proposed.

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Providing waterfowl hunting for a fee is a "rare case" opportunity-oriented business for most landowners. Only landowners who own wetlands with a tradition of high waterfowl use and landowners adjacent to or near state, federal or private waterfowl concentration areas can expect an economic return from commercial waterfowl hunting. But where habitat and land use practices are conducive to attracting concentrations of migrating and wintering ducks and geese, waterfowl hunting can be big business, contributing significantly to the economic well-being of a community. An example is Kent County, on Maryland's Eastern Shore. The upper Eastern Shore is the primary winter terminus for Canada geese wintering in the Atlantic Flyway and a commercial hunting industry has developed around the relatively recent abundance of geese. Kent is a rural county of fewer than 18,000 people living in several small towns and on 361 farms, mostly cash-grain, that average 370 acres (USDC 1988).

In 1986 an estimated $8,900,000 was spent in Kent County on hunting (Kent County Planning Dept. in Gibbons 1988) There were 24 licensed Kent County resident guide services and an additional 19 guide services headquartered in adjacent counties that worked in Kent County. These services leased 129 farms. An additional 50 farms were leased by private hunting clubs. Lease fees averaged $6,000 per farm for a total of $1,074,000 paid to local farmers for the use of their land. Average guide service fees of $100 per day per hunter generated an estimated $4,300,000; gratuities, $215,000; goose-picking, $250,000; and expenditures in the community for lodging, meals, gasoline, ammunition, etc. $4,500,000.

Lakeland Farm in Kent County is an example of an operator and family-run

goose hunting service on a 354-acre cash-grain farm (Brunori 1987). An 18 acre pond, constructed on the farm in 1966 and operated as a private sanctuary, attracts 30,000 to 40,000 Canada geese each fall and winter. Operating eight pits, leased by the day or for the entire 90 day season, in the crop fields surrounding the pond the operator could have grossed a maximum of $144,000 from hunting fees in 1985. Unfilled hunting dates reduced the operator's actual gross income to approximately $70,000.

Is the Kent County experience applicable to other states? Just what are the potentials and problems for income opportunities for the private landowner in the eastern U. S. from commercial waterfowl hunting?

Hunters

In 1977 there were about 1.1 million active adult waterfowl hunters in the 14 Mississippi and 17 Atlantic flyway states. These hunters were afield about 9.4 million days. A decade later the number of active adult waterfowl hunters had decreased to about 800,000 (27 percent decrease) and the days afield to 6.5 million (30 percent decrease), an average of seven days per hunter (unpubl. admin. rpt. USFW OMBM, 1987, 1979). A survey by the National Shooting Sports Foundation (unpubl. rpt. Hunting Frequency & Participation, October 1986) suggested that the decrease in waterfowl hunting, particularly goose hunting, reflected the hunters' increasing difficulty in gaining access to waterfowl hunting areas and crowding on hunting areas. Hunters in the South appeared to experience the most difficulty in gaining access to, and crowding on, hunting lands.

Waterfowl hunting occurs in each state but half the hunters were located in just seven states: Minnesota, Louisiana, Wisconsin, Michigan, Illinois, Pennsylvania, and New York (unpubl. admin. rpt. USFW OMBM, 1987). West Virginia with 1,400 waterfowl hunters has the fewest. Most (over 90 percent) migratory bird hunters hunt only in their state of residence (USDI 1988), and spend a larger proportion of their time (68 percent) hunting on private land (Langner 1987). In a 1980 survey of hunters, 3.1 percent of migratory bird hunters paid private land access fees that averaged $61 (Langner 1987). But in a much earlier survey of just waterfowl hunters (unpubl. admin. rpt. No. 25 Bur. Sport. Fish. and Wildl. MBPS. 1963) 13.8 percent and 8.7 percent of hunters in the Mississippi and Atlantic flyways, respectively, paid a private property fee or leased land. Hunters paid a fee most commonly in the Southern, Gulf Coast, and Chesapeake Bay Region states, and rarely in the New England states.

Socioeconomic characteristics of waterfowl hunters are available only as they are part of the larger group of migratory bird hunters (USDI 1988). Migratory bird hunters are predominately male (94 percent), equally likely to live in an urban (51 percent) or rural (49 percent) area, better educated (45 percent had attended college), and have higher incomes than other hunters and the general population (USDI 1988).

Waterfowl Populations

The 1988 fall flight index of ducks was the second lowest fall flight forecast on record. The droughts of the 1980s and agricultural activities removed nesting and brood-rearing habitat from the southern Canada and northcentral U. S. landscape. Duck populations have not reversed their general decline. The outlook for a rapid return to better breeding conditions and much improved duck populations is not good (Anon. 1988).

Mallards, wood ducks, blue-winged and green-winged teal, gadwall, American wigeon, black ducks, pintail and Canada geese are the most common waterfowl harvested by Mississippi and Atlantic flyways hunters (USDI 1988). Mallards are expanding their range eastward (Rogers and

Patterson 1984) and are now about one-fourth of the hunters' total bag in the Atlantic Flyway and have remained a stable one-third of the total bag in the Mississippi Flyway (USDI 1988). Mallard breeding populations in 1988 were 20 percent below long-term averages (Anon. 1988) and the evidence suggests that at least a portion of the population is being confronted by a long-term decrease in recruitment rates rather than short-term changes (Bartonek et al. 1984).

Blue-winged teal and pintail populations have, except for the occasional good year, trended downward since the 1970s and in 1988 are 25 and 54 percent below long-term averages, respectively. The American black duck population, as indicated by winter surveys, has generally decreased over the past three decades (Rogers and Patterson 1984). Only gadwall, American wigeon and green-winged teal populations have remained stable or increased (Anon. 1988).

Populations of Canada geese are stable or increasing in the Mississippi and Atlantic flyways. Most geese nest in the arctic and sub-artic regions of North America and these areas have not been seriously affected by development. Some of the impacts affecting ducks negatively have benefited geese. Geese have adapted to changes in migrational and wintering habitats. The shift to intensive cash-grain agriculture and the development of large open water impoundments have contributed to substantial buildups of geese in areas where few wintered before.

A negative has been the substantial redistribution of wintering geese away from the traditional areas in southern states northward to the northern and mid-latitude states. Louisiana, Florida, South Carolina and North Carolina are no longer primary wintering areas for geese in the eastern U. S. (Malecki and Trost 1986, Trost and Malecki 1985, Trost, et al. 1980). The redistribution appears to be continuing. The percentage of wintering geese is increasing in New York, Pennsylvania, and New Jersey (1986 to 1987, from 20 to 29 percent of flyway total), decreasing in Delaware, Maryland and Virginia (77 to 68 percent), and remaining stable in North and South Carolina (Hestbeck and Malecki 1989). Accompanying, and probably contributing to, this northward redistribution has been the buildup of resident non-migratory flocks of geese in the northern states.

Hunter harvest opportunities have likewise shifted to the mid-latitude and northern states. For example, a commercial hunting industry developed during the 1950-1960s in the area of Mattamuskeet National Wildlife Refuge, North Carolina, with its large concentration of wintering Canada geese. By the early 1970s commercial goose hunting was essentially over in North Carolina as the primary winter concentration of geese shifted north (Trost and Malecki 1985) to the southern Delmarva Peninsula. A number of commercial guiding services then prospered in the Talbot County, Maryland area. But the northward shift of geese continued so that by the late 1970s Kent County, Maryland was the primary area of commercial hunting interest.

1988 found the North Carolina goose hunter, who once enjoyed a 70-day season and a two-bird daily limit, reduced to a 17 day season, one-bird daily bag and facing demands from some sectors of the public for a total closure of goose hunting. The commercial hunting interests on Maryland's Eastern Shore, once prospering with a 90 day season and a three-bird daily limit, struggled to survive a restrictive 60-day season and a one- or two-bird limit imposed in an effort to turn around a 50 percent decline in numbers of wintering Canada geese. Canada goose numbers in Delaware and Maryland continued to decline in the January 1989 mid-winter waterfowl inventory. Early proposals for the 1989 goose seasons are for an even more restrictive 40- to 50-day season.

Income Opportunities

The landowner fortunate to have waterfowl hunting opportunities to offer the hunter has several income-producing options: an annual or seasonal lease of the hunting rights to the property, daily or season rentals of individual waterfowl blinds or pits, or a range of hunting guide and hospitality services. Leasing one's property for the season to a group of hunters or to a commercial hunting guide is the least financially risky option for the landowner. Daily rentals of blinds require greater involvement by the landowner and expose the landowner to the risk of uncertain income from unfilled hunting days. Offering a guiding service requires a considerable commitment from the landowner, plus a knowledge of people, hunting, dogs, guns, farming practices and wildlife habits.

Fees charged for waterfowl hunting vary considerably (Table 1) and depend on the services provided, the perceived quality of the hunting opportunity, the trophy value of the waterfowl, and hunter demand, which is affected by the availability of free access to public hunting areas. In Wisconsin, near the Horicon Marsh, Canada geese are considered vermin by local farmers and hunting is encouraged to control depredation. Hunting access is usually free. In the southern states waterfowl leases bring from $4 to $50 per acre for choice areas (Shelton 1987). Waterfowl lease fees averaged $6,000 per farm or about $16 per acre in Kent County, Maryland in 1986 (Gibbons 1987).

In my conversations with commercial guides and hunters in Delaware and Maryland, I learned of lease fees of $4,000 to $40,000 but the common fee in 1988 was $10,000 per farm. These annual fees for hunting rights had no relationship to the size of the farm, only to the perceived quality of the hunting opportunities. The bids for hunting rights to farms are expected to decrease 50 to 60 percent in 1989 (pers commun. T. Beaver, Maryland Waterfowl Outfitters Assoc.) because of the poor 1988 waterfowl season and the prospects for more restrictive seasons in 1989. Time will tell.

Costs of Providing Waterfowl Hunting

A North Carolina landowner/hunting guide I spoke with summarized the cost of providing waterfowl hunting succinctly. "Providing field hunting is cheap. Providing quality duck and goose hunting over flooded impoundments is expensive."

The landowner/farmer who leases waterfowl hunting rights to his property, be that crop fields or wetlands, in an "as is" condition to an outfitter, hunting club or individual need not incur any additional costs over and above those costs associated with his normal farming operation. The landowner can choose to assume none of the financial costs or risks associated with the hunt. The landowner's only costs need be the price of a newspaper ad to advertise the property's availability and attorney fees to draft a lease agreement.

But add amenities to the hunt, or improve habitat to attract and hold ducks and geese on the property, or become involved as an outfitter/guide and costs escalate steeply. These added costs can range from a few hundred dollars for building a field blind or leaving a few rows of standing corn to tens of thousands of dollars for constructing impoundments and water supply systems (Table 2). The landowner has two options. He can personally incur these costs and later hope to recover his expenditures through hunting fees, or he can shift all or some of the additional costs on to the lessee. This latter option is workable where long-term relationships are established between the landowner and lessee, and the lease agreement is of sufficient length to allow the lessee to recover his investment in habitat improvements and amenities to the hunt.

Returning to the example of Lakeland Farm given earlier (Brunori 1987), the operator and his family improved habitat conditions on the farm, provided amenities to the hunt and guided. The sanctuary pond cost $20,000 to construct in 1966, yearly maintenance costs were $1,000 for pits and $1,000 for vehicles and gasoline cost $500. The operator planted 8

acres of millet, 20 acres of corn and 16 acres of rye as goose forage that I estimate cost him $4,300 to plant. The operator, not owning the land, paid a premium farmland rental to the owner who probably valued the hunting rights at a minimum of $10,000. Subtracting the amortized cost of the pond, the annual food plot costs and other maintenance costs from the $70,000 estimated gross income, the operator and family received approximately $50,000 for their management and labor input for the 90-day season.

Cost of Producing a Duck

Private landowners control considerable amounts of waterfowl habitats either as individuals or collectively as clubs. Waterfowl hunting clubs alone are thought to control several million acres (USDI 1988). This habitat is extremely important to migrating and wintering waterfowl, and certainly contributes to the annual production of waterfowl as well. Can the private landowner in the eastern U. S. improve waterfowl nesting habitat and thereby produce additional ducks and geese to improve the prospects for fee hunting?

The costs to produce a duck or goose, as opposed to attracting and holding migrating waterfowl, for the hunt is then the question. Lokemoen (1984) examined various management practices in the prime duck rearing areas of the Dakotas and Minnesota and found that the annual amortized cost to fledge a duckling was generally high. Ducklings fledged from man-made island, pond and impoundment type projects cost $130 to $580 per duck. Establishing grassy nesting cover or providing elevated nest structures were more cost-efficient at $8 to $48, and $8 to $26 per duck, respectively. Least costly was predator management at $2 to $3/duck.

Nest boxes with predator guards produced fledged wood ducks in South Carolina at $1.87 per duck (Prevost et al. 1988). Canada geese have been produced at a cost of $10 to $11 per gosling hatched on small rock islands and straw bale structures in Alberta (Giroux 1983) and at a cost of $1.37 per gosling hatched on elevated nest structures in Montana (Mackey et al. 1988). Here in the eastern U. S. we might expect that with lower breeding populations, with the exception of the wood duck, the cost per fledged duckling or gosling would be higher. Raising and releasing hand-reared ducks is not inexpensive either. A 5-week-old hand-reared mallard can be purchased from a commercial producer for release this July for about $4.25 per bird. Remington Farms' cost per mallard released and fed on the release ponds until October has been about $5 per bird (Soutiere 1986).

However, the important cost to the operator of a commercial waterfowl operation is not the cost per bird fledged but the cost per bird in the hunter's bag. With harvest rates for both wild (Anderson 1975) and hand-reared mallards (Soutiere 1986) approximating 20 percent, the cost to put a mallard in the hunter's bag is five times the cost to produce that duck. Clearly, locally produced waterfowl are not a viable option for most commercial waterfowl operations. Habitat conditions in the prairie pothole region and the Canadian tundra will continue to control the prospects for commercial waterfowl hunting.

Crop Damage

Depredation of agricultural crops by waterfowl is not a major problem for most farmers in the eastern U. S. Most crops have been harvested by the time ducks and geese arrive on their southward migration. A localized exception is the depredation by Canada geese of unharvested corn during wet falls in Dodge County, Wisconsin, near the Horicon Marsh. Estimates of damage range from $0.5 to $1.5 million (pers commun. R. Birger, USFWS, Horicon NWR). A second, more general, exception is damage to small grain crops (winter wheat, rye, barley) by grazing Canada and snow geese and

tundra swans. Yields can be reduced by a single severe grazing any time between emergence in early fall and jointing in late spring (Kahl and Samson 1984, Flegler, et al. 1987).

Hunting is the best way to control depredation by ducks and geese of crops but much of the damage to fall planted small grains occurs in late winter and early spring after the hunting season has closed. The landowner who is too successful in attracting and holding wintering waterfowl will find that he and his neighbors may be limited as to where they can plant small grain. Explosive scare devices, flags, balloons and trained dogs have all been used with good effect but immediate action and persistence is required (Pfeifer 1983).

Public Trust Doctrine and Uncertainty

In the United States the Public Trust Doctrine assigns ownership of the nation's wildlife resources to the state or federal government. The public agency is expected to pursue broad economic efficiency rather than the more narrow and incomplete financial incentives seen by private individuals. In this way wanton resource exploitation and the tragedy of the commons are hopefully avoided (Loomis, et al. 1984). Operating under this doctrine the U. S. Fish and Wildlife Service and the state natural resource agencies set annual waterfowl hunting regulations that to some degree influence the management actions and investments of hunting-oriented landowners (USDI 1988).

Unlike hunting regulations for upland and forest game, which usually have traditional opening dates and stable season lengths and bag limits, waterfowl hunting regulations are subject to frequent annual change and are not finalized until mid-September or later each year (USDI 1988). This creates uncertainty, which farmer/landowners dread. This uncertainty discourages investments in habitat and wildlife improvements (Shelton 1982), and it hampers the landowner's ability to plan.

Habitat improvements, such as impoundment construction, are expensive and the returns are deferred. Such investments will not be made by landowners if they are uncertain they can recover their cost. The commercial waterfowl hunting operator requires long lead times to book dates for hunting clients, to negotiate land leases, to construct impoundments, to build blinds and pits and to plant food plots. Uncertain waterfowl season starting dates, season lengths and bag limits make this planning and preparation difficult if not impossible. Unfortunately the waterfowl regulatory process is fixed and inflexible due to the need to conduct waterfowl population surveys, evaluate population data, cooperate with flyway councils and inform the public (USDI 1988).

Once commercial waterfowl hunting is established, regulatory change, particularly season restrictions, is certain to cause a clash between the state natural resource agency responsible for managing the waterfowl resource and the public that now has a financial interest in waterfowl hunting. Again, Kent County, Maryland provides the example. Faced with restrictions in the Canada goose season, commercial hunting guides, landowners, local businessmen, and county and state politicians have allied themselves against the state Department of Natural Resources (DNR) to stop and to turn back proposed season restrictions. Rancorous public hearings, court injunctions, threats of bodily harm against the state waterfowl project leader, and legislation introduced into the state legislative assembly to restrict the regulatory authority of the DNR to set waterfowl seasons are a result of the conflict.

Conclusion

Providing waterfowl hunting for a fee is an opportunity-oriented business for those landowners with wetlands that have a tradition of waterfowl use, and for those whose land is near federal, state or private wildlife management areas that attract concentrations of migrating and wintering waterfowl. The two resources with which the landowner must work, waterfowl hunters and waterfowl, are declining in numbers, and distribution of waterfowl populations are shifting away from the traditional wintering areas in the southern states to the mid-latitude and northern states.

Waterfowl hunters are already experiencing difficulty finding a place to hunt, and those areas they do find are crowded. Duck numbers are not likely to turn upward quickly and Canada geese are continuing their northward shift in distribution creating further shortages of opportunity for waterfowl hunting. For those of us in the wildlife management profession these changes are negatives, but for the landowner with quality waterfowl hunting to offer, the laws of supply and demand are in his favor. Duck and goose hunters have clearly demonstrated their willingness to pay landowners for access to quality hunting.

For most landowners the simplest and least risky arrangement for generating income from waterfowl hunting is an annual lease of hunting rights to an individual or group of hunters, or to a hunting outfitter. Both landowner involvement and cost can be kept to a minimum with a lease arrangement. Providing a guiding service offers the opportunity for greater income, but is riskier and more costly, and is only for the few with the required talent and experience.

Private landowners and waterfowl hunting clubs are now providing millions of acres of waterfowl habitat. Encouraging landowner opportunities for income from waterfowl hunting may prove to be a way to preserve or improve additional habitat. But the creation of a financial interest in waterfowl hunting is certain to lead to conflict between the state natural resource agency and the commercial waterfowl interests over season regulation changes. Season length reductions and bag limit restrictions can reduce considerably hunter participation and thereby reduced income opportunities for landowners and community businesses. Landowners, hunters, and the public must be kept aware that the agency's priority is the long-term well-being of the waterfowl population, not to the short-term financial interest of a few landowners, guides, and businessmen.

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Table 1. Examples of fees charged for waterfowl hunting on selected areas in the eastern U.S.

Location	Arrangement	Fees	Comments
New Castle Co., Delaware	Daily	$250/hunter	Hunting with lodging and meals; Everything except shells, game cleaning, and gratuities.
S. Illinois[a]	Daily	$50/hunter	Goose blind use only.
W. Iowa	Annual lease	$5,000	20-acre flooded impoundment plus use of house. Near federal refuge.
Spirit Lake, Iowa	Daily	$100/hunter	Guided Canada goose hunt. Guide pays farmer $25/day a group hunts.
SW Louisiana[a]	Daily	$250/hunter	Everything except shells, game cleaning, and gratuities.
NE Louisiana[a]	Annual lease	$3,500 to $7,500/blind	Ten flooded acres, with blind, in rice field or greentree reservoir
Cameron Parish[a], Louisiana	Annual lease	$18.75 to $31.25/ac	Four blinds in 640 acres of rice field: no services; lease included clubhouse
Dorchester Co., Maryland	Annual lease	$10,000	750 acres with 4 water and 4 field blinds; farmer plants and harvest 500 acres of corn
Kent Co., Maryland	Daily	$270/blind	Goose blind use; maximum of 5 hunters; decoys provided. Add $80 for guide.
Queen Annes Co., Maryland	Daily	$150/ for 1 $100/ for 2 +	Everything except shells, game cleaning, and gratuities
Maine coast	Daily	$250/hunter	Sea duck and black duck hunting with lodging and food. Everything except license, shells, game cleaning and gratuities
Merrymeeting Bay, Maine	Daily	$90/hunter	Duck hunt including guide, boat and decoys
Missouri[b]	Daily Annual lease	$2.50-$25 $34/pit $300-$3,000	Per hunter. Average fee. A few leases included decoys and camping areas.

Table 1. (Continued.)

Location	Arrangement	Fees	Comments
Fairfield, N. Carolina	Daily	$580/blind/4 men	5 parties/day 4 days/week. Guide,boat & decoys provided. Farmer floods two 50-acre impoundments planted to corn, soybeans and millet. Adjacent to federal waterfowl refuge.
Fairfield, N. Carolina	Annual lease	$10,000	500 acre farm with 30-acre impoundment. 10 acres of corn left standing. Adjacent to federal waterfowl refuge.
N. Carolina	Daily	$70-75/hunter	Tundra swan hunt. Guide, pit, & decoys provided.
Southeast Pennsylvania	Daily	$35/blind/3 men	Goose hunting. Nothing provided. Farmer has 2 blinds. Adjacent to state management area.
Southeast Pennsylvania	Daily	$150/pit/4 men	Goose hunting. Guide and decoys provided. Farmer has 4 pits. Adjacent to state management area.
Addison Co., Vermont	Annual lease	$10/ac	State agency exchanges farming rights on public goose hunting area for hunting rights to adjacent private farmland.
Dodge Co. Wisconsin	Daily	free to $7/hunter	Canada goose hunting near federal refuge. Crop depredation common.

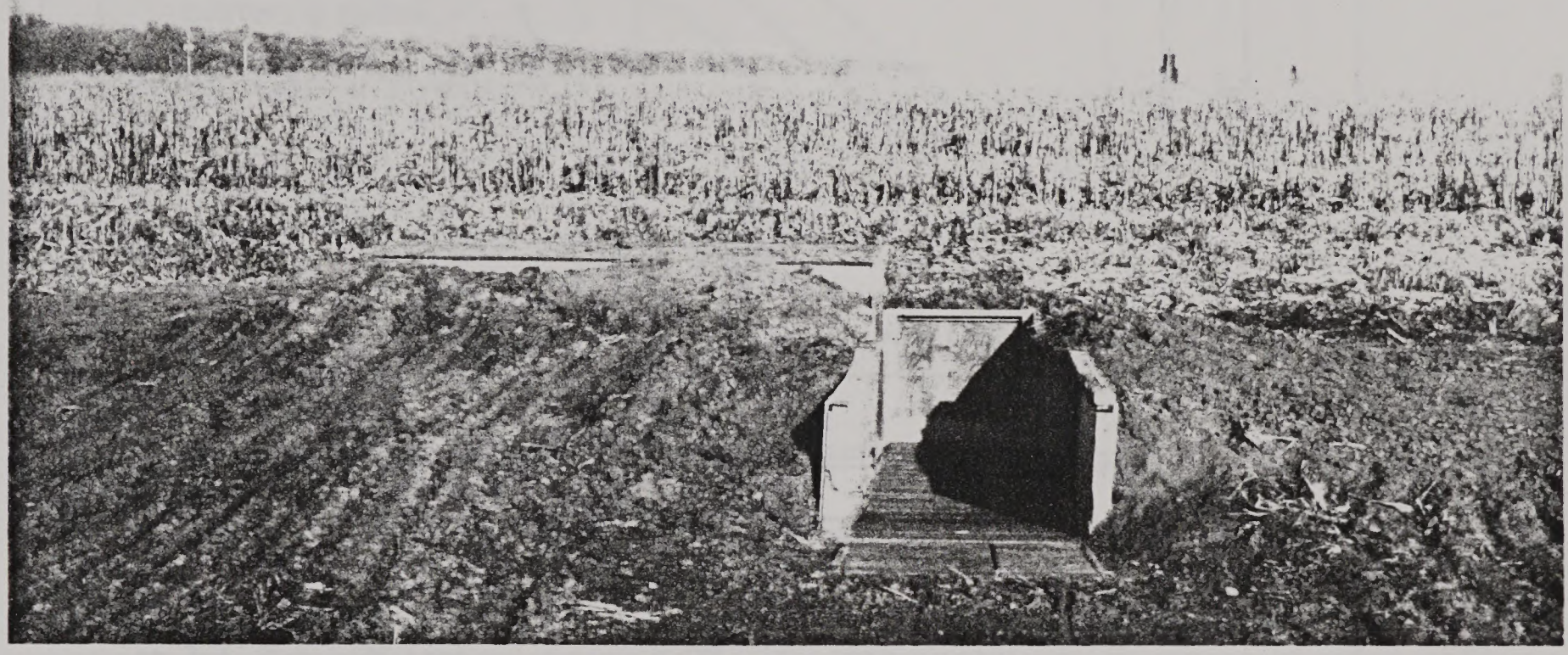
[a] Source: Wesley 1987.
[b] Source: Schenck et al. 1987.

Table 2. Examples of costs, in 1989 dollars, of amenities and management practices associated with waterfowl hunting on Remington Farms, Kent County, Maryland.

Item	Cost	Comment
Hunting guide	$60 day	Seasonal, part-time.
Propane heaters	$35 each	1 pit. $5-$10 of fuel used on bitter cold days.
'Stuffer' decoys	$40 each	Canada goose taxidermy mounts. Use 50-100/pit. Not useable in rain.
Plastic decoys	$29 each	Canada goose. Use 50-100/pit or blind.
Hand-reared Mallards	$5 each	Purchased as 1-day-olds. Released at 5-wks. Fed on ponds until October.
Standing corn	$150/acre	Left as 5-acre blocks or as 4 rows to conceal blinds
Millet, sorghum	$70-90/acre	Planted in impoundments to be flooded for ducks.
Rye	$16/acre	Aerial seeding over corn prior to harvest for fall-winter goose pasture
Concrete pit	$1,200 each	6-man. $300 of cost is for roof, bench,stairs, etc. of treated lumber.
Wooden pit	$470 each	5-man Treated lumber.
Field blind	$190 each	5-man. Above ground and moveable.
2-acre farm pond	$9,000	$2,700 for aluminum control structure. $6,300 for earth work No land clearing was needed
30-acre field impoundment	$16,000	3 compartments with 6 control structures ($750 ea) and 6 000 lin ft. of 30 in. high dike ($2 10 lin ft.).1 side natural diking
Irrigation well	$68,000	8 in . 300 ft. deep, 300 gal min

Goose Pit is Handicapped Accessible

Rolling in...



Ben Hall Photo

Key players during the construction phase of this handicapped accessible goose pit on Sloughs WMA were Mike Morton, area supervisor; Eddie Wallace, area foreman; and Barry Richmond, wildlife aide.

Goose hunters who have difficulty in moving around will get a boost this season with the addition of a ramp-equipped pit on Sloughs Wildlife Management Area (WMA) near Henderson, Kentucky.

The shooting pit, completed in the fall of 1989 on the Duncan Tract off Highway 268, is thought to be the first of its type in the state.

"This year, we've received 13 requests for information on handicapped-access pits and blinds," says Sloughs manager Mike Morton, explaining why the Kentucky Department of Fish and Wildlife went ahead with the project.

The idea for the specially equipped pit was born a couple of years ago at the wildlife division's annual staff meeting in Frankfort, says Morton. It was during this meeting officials decided any new construction by the department would be designed for easy access by those who use wheelchairs, crutches and walkers.

While the planners talked mostly about buildings, Morton recalled a ramp-equipped goose pit he had seen at a Missouri state facility a couple of years before.

"After that everything just sort of came together," Morton said. The basic plans and specifications were worked out by Eddie Wallace, the WMA's foreman, and Lauren Schaaf, the department's wildlife director, approved them at once.

In the final planning of the project, Morton also sought advice from George Givens, a local, wheelchair-bound hunter.

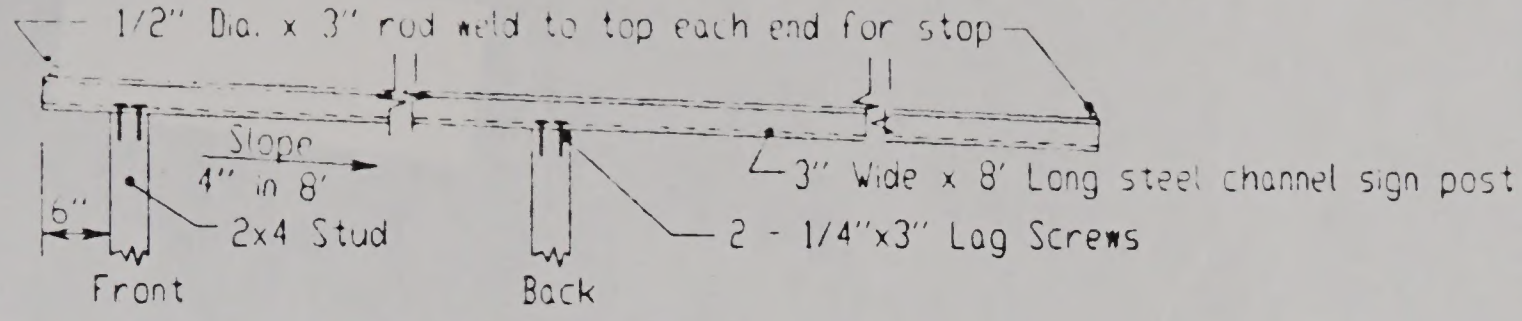
In addition to its 24-foot-long ramp with steel mesh floor, the new pit has other modifications making it different from all of the other 35 sites on the wildlife area.

A standard pit is four-feet wide and 10-feet long, but the special pit is considerably larger at eight by 12 feet. Add the four-foot ramp and the overall width equals 16 feet. The opening to the pit is four-feet wide, the same width as the ramp. That's 12 inches more than wheelchair users said they would need for easy entry.

There are no plans for other specially equipped pits at the WMA now, but the final decision depends on how much use the new structure gets and what recommendations users make.

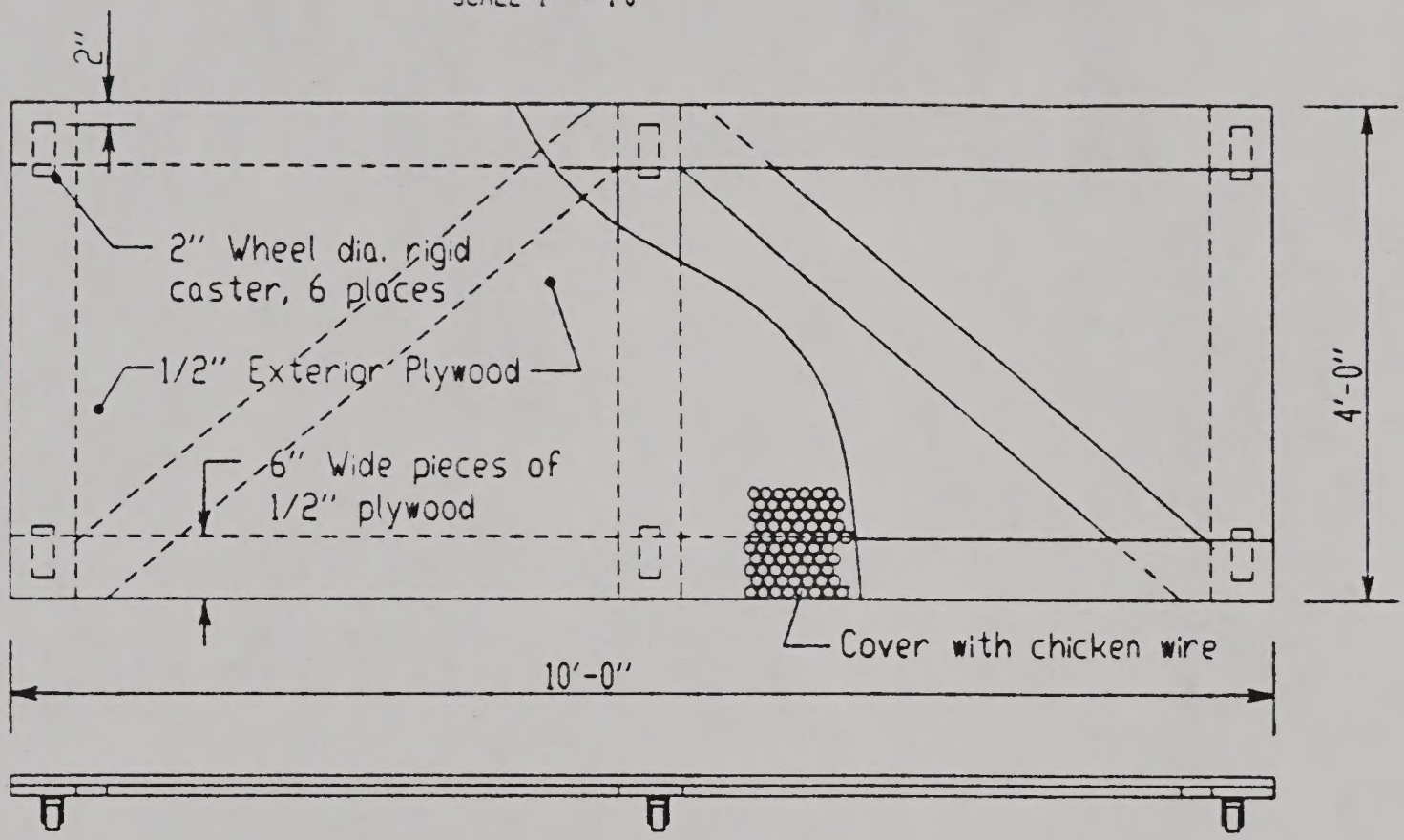
The Henderson County project will be repeated elsewhere. A ramp-accessible pit will be available next year on Ballard Wildlife Management Area in far Western Kentucky.

by Ben Hall



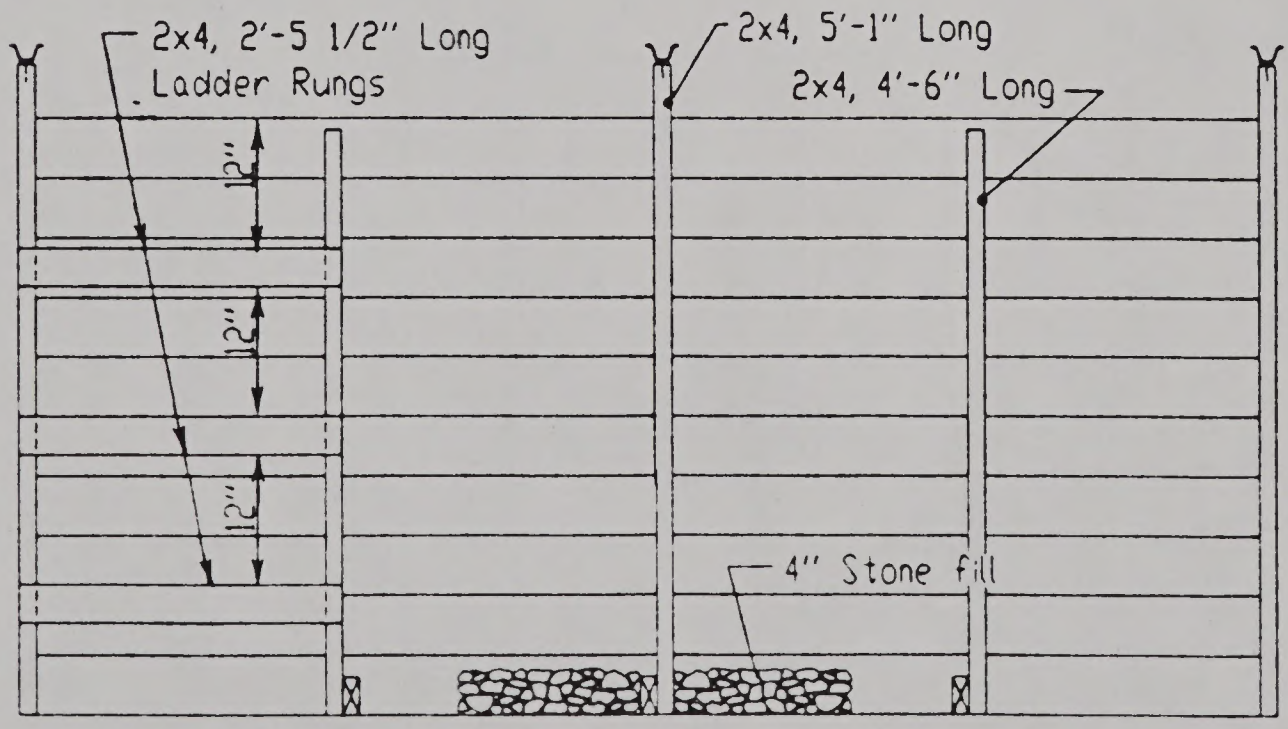
RUNNER DETAIL

SCALE 1" = 1'0"



LID PLAN & ELEVATION

SCALE: 1/2" = 1'-0"

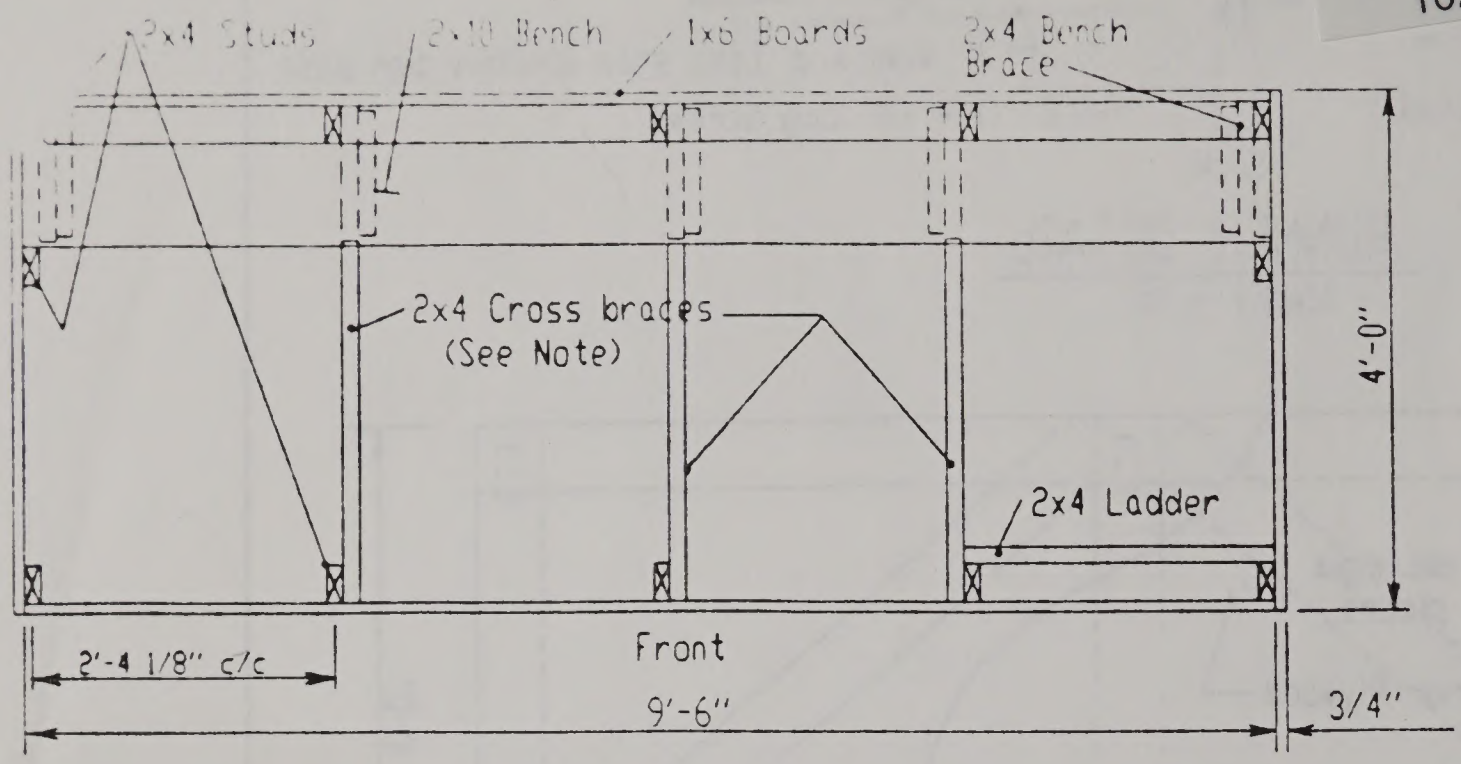


FRONT ELEVATION

(Viewed from inside)

SCALE: 1/2" = 1'0"

DWG. NO. 001-02	PENNA. GAME COMMISSION BUREAU OF LAND MANAGEMENT	PIT BLIND LID AND FRONT ELEVATION	BY: RWK DATE: JULY 1989

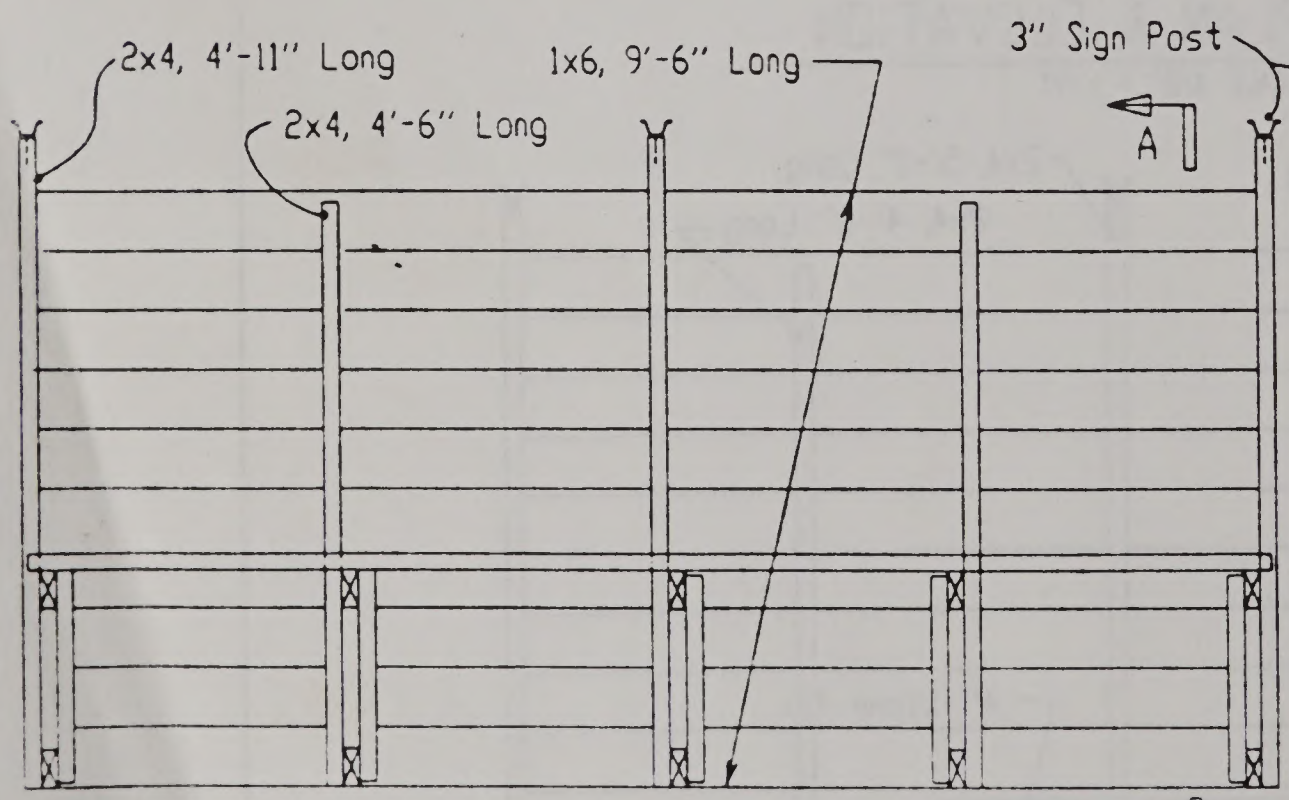


PLAN VIEW

SCALE: 1/2" = 1'-0"

NOTES:

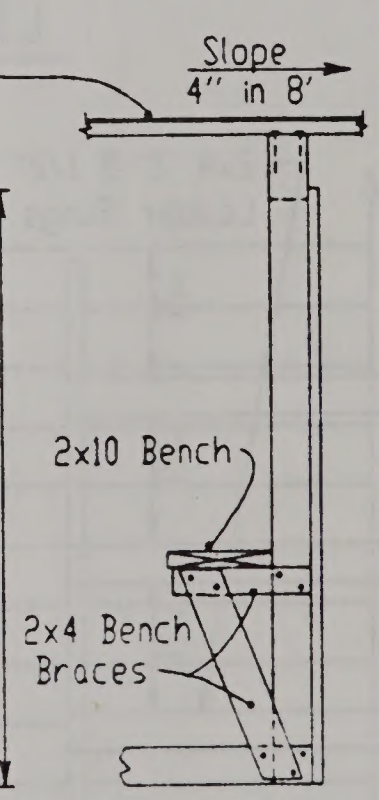
- Install bottom 2x4 cross braces permanently, top braces are to be installed during backfill and during periods of non-use.
- Treat all wood surfaces with wood presevative or sealer.
- Cover exterior of blind below ground line with 30# roofing felt.
- Install 3/8" thick wood strip in each post channel.



BACK ELEVATION

(Viewed from inside)

SCALE 1/2" =1'-0"



SECTION A-A

SCALE 1/2" =1'-0"

DWG. NO. 001-01	PENNA. GAME COMMISSION BUREAU OF LAND MANAGEMENT	PIT BLIND PLAN AND ELEVATION	BY: RWK DATE: JULY 1989